86-69

No. ———

Supreme Court, U.S.
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IN THE
Supreme Court of the United States
OCTOBER TERM, 1986

AMERICAN TRUCKING ASSOCIATIONS, INC., *et al.*,
Petitioners

v.

WILLIAM CONWAY, *et al.*,
Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF VERMONT

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QUESTION PRESENTED

Whether a state may exact a tax from an interstate motor carrier as a precondition to operation of trucks on the state's highways, resist preliminary injunctive relief on the ground that an adequate refund remedy is available, and then, when the tax is found to violate the Commerce Clause of the United States Constitution, invoke sovereign immunity as a basis for refusing to refund the taxes unconstitutionally collected.

PARTIES TO THE PROCEEDING AND RULE 28.1 STATEMENT

This petition seeks review of judgments in two class actions decided by the Vermont Supreme Court on the same day and involving essentially the same parties (the only difference is in the identity of the named plaintiffs, all of whom are petitioners in both cases because of their inclusion in the class). Petitioners herein, and their parents, subsidiaries, and affiliates, are as follows:

Petitioner American Trucking Associations, Inc., is an independent corporation that has no subsidiaries or affiliates that are not wholly owned.

Petitioner Anderson Trucking Services, Inc., is an independent corporation whose subsidiaries and affiliates (other than wholly-owned subsidiaries) are St. Cloud Truck Sales, K & W Trucking Co., Inc., H.E. Anderson Equipment Leasing, and R.B.J. Industries, Inc.

Petitioner Chemical Leaman Tank Lines, Inc., is a subsidiary of Chemical Leaman Corporation. Chemical Leaman Tank Lines' affiliates or subsidiaries (other than wholly owned subsidiaries) are Despatis Transport Ltd., Chemical Properties, Inc., Tank Service Company, Kipsch Hauling Company, Chemical Leaman Container Corporation, and NuBulk Services, Inc.

Petitioner G.H. Harnum, Inc., is an independent corporation whose affiliates and subsidiaries (other than wholly-owned subsidiaries) are Marco Construction, Inc., G & W Realty Trust, and K & W Realty Trust.

Petitioner International Transportation, Inc., which has no affiliates or subsidiaries that are not wholly owned, is a subsidiary of Schneider National, Inc.

The remaining petitioners are the unnamed class members, consisting of all interstate motor carriers primarily registered outside of the State of Vermont and sub-

ject to the payment of the fees and taxes challenged by the named petitioners.

Respondents, all parties in their capacity as officers of the State of Vermont, are William Conway, Commissioner of Motor Vehicles, Paul Philbrook, Commissioner of Public Safety, Richard Snelling, Governor, and Thomas Evslin, Secretary of the Agency of Transportation, or their successors in office.

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PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF VERMONT

The American Trucking Associations, Inc. ("ATA"), *et al.*, hereby petition for a writ of certiorari to review the judgments of the Supreme Court of Vermont in these related cases, which involve essentially the same parties and the same legal issues.

OPINIONS BELOW

The opinion of the Supreme Court of Vermont in its No. 83-484 (App. A)[1] is reported at 508 A.2d 408. The opinion of the Supreme Court of Vermont in its No. 83-452 (App. C) is reported at 508 A.2d 405. An earlier opinion of the Supreme Court of Vermont in that case (App. E) is reported at 142 Vt. 17, 451 A.2d 42. The opinions, orders, and findings of the Superior Court of

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[1] References in this petition to "App. ——" are to the separately bound Appendix.

Washington County (Apps. F, G, H, I, and J) are unreported. The opinion of the United States District Court (App. K) is reported at 514 F. Supp. 1341.

JURISDICTION

The judgments of the Supreme Court of Vermont (Apps. B and D) were entered on February 21, 1986. Justice Marshall extended the time to petition for a writ of certiorari to July 21, 1986. The jurisdiction of this Court rests on 28 U.S.C. § 1257(3).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

This case involves the Commerce Clause of the United States Constitution and the Due Process Clause of the Fourteenth Amendment. The relevant Vermont statutory provisions are set forth in Appendix L.

STATEMENT

This case grows out of petitioners' successful challenge to the constitutionality of two taxing schemes adopted by the State of Vermont under which trucks registered outside of Vermont were required, on pain of civil and criminal sanctions, to pay certain taxes as a precondition to the use of Vermont's highways, while Vermont-registered trucks were effectively exempted from these taxes. Although the Supreme Court of Vermont found that the taxes violated the Commerce Clause of the United States Constitution because of their discrimination against interstate commerce, it construed a state statute providing for refunds of "illegally" collected taxes as not authorizing refunds of unconstitutional taxes and held that, in the absence of statutory authorization, the doctrine of sovereign immunity barred the ordering of a refund.

A. The Statutes

In 1981, to raise additional funds to support its highway system, the Vermont legislature passed Act 87, which

established a set of taxes to be assessed against trucks registered outside the State as a precondition to their entry into Vermont. Codified at Vt. Stat. Ann. tit. 23, §§ 415, 415a, 417 (Supp. 1981), this statute required operators of non-Vermont-registered trucks weighing 18,000 pounds or more to pay a flat fee of $40 per year for each truck that would be operated in Vermont and to pay a further fee of $15 each time such a truck entered the State. In addition, a retaliatory surcharge of $10 per entry was levied if the truck was registered in a state that imposed multiple taxes on trucks using its highways. As an alternative to the foregoing taxes, a single-trip permit could be obtained for a $40 fee. None of these taxes or fees was imposed on trucks registered in Vermont. See App. at 16a.

In early 1982, following the filing by petitioners of a suit challenging the constitutionality of Act 87's entry tax system, Vermont repealed the statute. It replaced the Act 87 system with a different scheme (Act 172) under which every truck of 18,000 pounds or more was required to pay a $50 annual fuel user's license fee (the "$50 decal tax") and to display the decal received upon payment of the fee (or to pay the same $50 for a temporary or single-trip authorization). Vt. Stat. Ann. tit. 23, §§ 415, 3007, 3010 (Supp. 1982). While on its face this $50 decal tax applied equally to trucks registered in Vermont and to those registered in other states, Act 172 in fact kept the entire burden on out-of-state trucks by reducing by exactly $50 the annual registration fee for Vermont trucks weighing over 18,000 pounds. Vt. Stat. Ann. tit. 23, § 367(a) (Supp. 1982).

B. The Litigation

1. *ATA I.* Shortly before Act 87's entry tax system went into effect in 1981, petitioners filed suit in the United States District Court for the District of Vermont challenging the validity of the taxes under the federal Constitution on the ground that they discriminated

against interstate commerce in violation of the Commerce Clause and seeking a temporary restraining order and preliminary injunction against their collection. See App. at 82a. The district court declined to take jurisdiction of the case, invoking the Tax Injunction Act, 28 U.S.C. § 1341, and finding that a "plain, speedy and efficient remedy" was available to petitioners in the courts of Vermont. App. at 82a-87a. Its conclusion was based in part on the availability of declaratory and injunctive relief in the Vermont courts, but also rested upon the apparent power of those courts to award monetary relief (*id.* at 86a). In this connection, the district court took note of an affidavit filed by state officials indicating that refund relief would be available from the Commissioner of Motor Vehicles under Vt. Stat. Ann. tit 23, § 328 and from the Vermont courts either in reviewing the Commissioner's determination or in exercising inherent equitable powers. App. at 86a n.1.

Petitioners promptly renewed their constitutional challenge in Vermont Superior Court. App. at 17a, 80a.[2] Their request for temporary injunctive relief was denied by that court, which relied upon the availability of a state statutory refund mechanism in the event the tax statute was invalidated. The Superior Court stated (*id.* at 80a-81a):

> [N]o irreparable injury will occur to Plaintiffs should the new fee system be permitted to go into effect. Defendants' records will permit any excess fees wrongfully collected to be exactly determined and speedily refunded to specific Plaintiffs should they prevail on the merits.[3]

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[2] The proceedings in the Vermont courts challenging Act 87's taxes have been referred to by the courts and parties as *"ATA I"* and are so designated in this petition. The proceedings challenging the successor legislation (Act 172) have been and will herein be referred to as *"ATA II."*

[3] The issue presented to this Court concerns not the substantive validity of the challenged Vermont taxes—which were struck down

In expedited proceedings on the merits, the Superior Court certified a plaintiff class consisting of all interstate motor carriers whose vehicles were primarily registered in states other than Vermont but would be operated in Vermont and therefore be subject to the tax. App. at 16a & n.1. The parties stipulated that Act 87 entry taxes paid by out-of-state carriers would amount to approximately $7.5 million during fiscal 1982 (*id.* at 74a). In January 1982, the Superior Court rejected petitioners' constitutional challenges to the entry taxes and dismissed the complaint (*id.* at 70a-79a).

Petitioners appealed to the Supreme Court of Vermont. Because the taxes levied by Act 87 had been repealed by the time it rendered its decision, thereby mooting the claims for declaratory and injunctive relief, the court described the "sole issue" in the appeal to be whether petitioners were entitled to refunds for taxes collected under Act 87 "on the ground that the taxes were unconstitutionally exacted" (App. at 27a). The court then proceeded to clarify the legal standard for determining the validity of the taxes, and remanded the case for further findings as to the extent of actual discrimination against interstate commerce (*id.* at 27a-30a).

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as violative of the Commerce Clause by the Supreme Court of Vermont—but petitioners' right under the federal Constitution to obtain the return of taxes that were unconstitutionally exacted from them. As the lawsuits were originally filed, the claim of entitlement to a refund was made as an integral part of the constitutional attack on the validity of the taxes. Although petitioners did not separately argue that the Constitution requires a refund remedy for taxes collected in violation of the Commerce Clause, it appeared unnecessary to do so. As is evident from the above ruling of the Superior Court and the discussion in the rest of the Statement, neither the defendant state officers nor the federal or state courts questioned (until the litigation had proceeded for many years and tens of millions of dollars in taxes had been collected) that a finding of unconstitutionality would lead to a refund. Thus, the sub-issue of remedy did not emerge as a distinct federal question (in a case concerned exclusively with federal constitutional rights) until the Supreme Court of Vermont rendered the decisions here challenged.

On remand, the Superior Court again upheld the taxes (App. at 65a-69a), and petitioners again appealed. This time the Supreme Court of Vermont reached the merits and found the entry tax plan violative of the Commerce Clause because of its facial discrimination against interstate commerce (App. C). The court explained (*id.* at 19a):

> Under Act 87 foreign-registered truckers must pay the fees while Vermont-registered truckers and their customers are protected from the impact of the tax. Members of the plaintiff class are at a competitive disadvantage.

2. *ATA II.* Act 172, repealing the entry tax system and substituting the $50 decal tax, was enacted in early 1982 with an effective date for the new tax of December 1, 1982. In June 1982, well before this effective date, petitioners filed a new class action in Vermont Superior Court challenging the decal tax on essentially the same federal constitutional grounds as the Act 87 entry tax had previously been attacked. The complaint alleged that the nominally even-handed tax in fact had a drastically disparate impact on Vermont and non-Vermont trucks because it was coupled with a $50 reduction in Vermont truck registration fees, which eliminated any burden on Vermont truckers. The complaint therefore charged that Act 172 discriminated against interstate commerce in violation of the Commerce Clause and that petitioners were entitled to declaratory and injunctive relief and to refunds of all decal tax payments that might be made during the course of the litigation. The parties entered into stipulations covering many of the pertinent facts; as to the subject of refund relief, the parties agreed as follows (App. at 31a):

> That in the event the Act is finally declared to be unconstitutional and void in whole or in part, by Order of a Vermont Superior Court or any higher court having competent appeals jurisdiction thereof, any fees and penalties wrongfully or illegally ob-

> tained by the State of Vermont and its instrumentalities and ordered to be repaid thereby may be refunded pursuant to 23 V.S.A. § 3020 . . . , 23 V.S.A. § 328 or in any other manner ordered by such Court.

The Superior Court found that the decal tax scheme violated the Commerce Clause, both because of its facial discrimination against interstate commerce and because it resulted in per mile costs for out-of-state carriers many times greater than those for Vermont carriers (App. at 57a-60a). Nevertheless, the court concluded that it lacked power at that juncture to order refunds of taxes unconstitutionally exacted (*id.* at 31a-32a). This ruling reflected the court's view of the limitations imposed on its remedial powers by the Vermont declaratory judgment statute, but it was coupled with a recognition of petitioners' right to seek refunds from the Vermont Commissioner of Motor Vehicles under Vt. Stat. Ann. tit. 23, § 3020(b), subject to possible judicial review of the action on such refund applications. App. at 32a.

On February 21, 1986, concurrently with its decision invalidating Act 87's entry tax, the Supreme Court of Vermont struck down Act 172's decal tax as unconstitutionally discriminatory (App. A). Relying upon this Court's decisions in *Maryland* v. *Louisiana*, 451 U.S. 725 (1981), and *Westinghouse Electric Corp.* v. *Tully*, 104 S. Ct. 1856 (1984), the court concluded that the result of the offsetting reduction in registration fees for Vermont trucks was a discrimination against interstate commerce resulting in "a direct commercial advantage to Vermont truckers." App. at 7a.

3. *The Refund Decision.* In both cases, despite its findings of unlawful discrimination against interstate commerce, the Supreme Court of Vermont refused to order refunds of the taxes exacted from petitioners during the litigation in violation of the Commerce Clause. App. at 9a-12a, 21a. The court based its decision on sovereign immunity, noting that the State could not be

sued under Vermont law for injuries suffered as the result of performance of governmental functions, which included imposition and collection of taxes, in the absence of a state statute authorizing the suit.

The court then turned to the question whether statutory authority existed for a suit seeking a tax refund. It examined (App. at 11a) the refund statute that was passed as part of Act 172 (Vt. Stat. Ann. tit. 23, § 3020(b)). That statute provides in pertinent part that if a tax "has been illegally or erroneously collected or computed, the excess amount paid or collected shall be credited . . . [or] refunded." This enactment, the court concluded, is concerned with "redressing errors in the enforcement or implementation of the diesel fuel tax [and] merely provides for a refund mechanism if errors are made in determining what tax is imposed" (App. at 12a). The court held that Section 3020(b) does not authorize refunds of payments of illegal taxes, stressing that the legislature had not appropriated monies to be used for refund purposes were the statute to be invalidated.

REASONS FOR GRANTING THE PETITION

I. THE VERMONT SUPREME COURT'S DECISION RAISES A FREQUENTLY RECURRING CONSTITUTIONAL QUESTION OF GREAT IMPORTANCE TO INTERSTATE MOTOR CARRIAGE IN THE UNITED STATES.

The motor carrier industry pays billions of dollars annually in state highway taxes. *See* Federal Highway Administration, Department of Transportation, *Highway Statistics 1984*, at 66. Increasingly over the past several years, states have modified their systems for levying highway-related taxes, fees, or charges to shift the burden of payment away from their own domestic carriers and onto operators of out-of-state vehicles engaged in interstate

commerce. Consequently, over the past five years, state courts have frequently found themselves obliged, in reliance on this Court's decisions construing the Commerce Clause of the United States Constitution, to invalidate a number of state highway imposts on the ground of impermissible discrimination against interstate commerce. *See American Trucking Associations, Inc.* v. *Quinn*, 437 A.2d 623 (Me. 1981); *Huie* v. *Private Truck Council of America, Inc.*, 466 N.W.2d 435 (Ind. 1984); *Private Truck Council of America, Inc.* v. *Secretary of State*, 503 A.2d 214 (Me. 1986), *cert. denied*, —— U.S. ——, 106 S. Ct. 1997 (1986); *Private Truck Council of America, Inc.* v. *Louisiana*, No. 289, 481, [2 La.] St. Tax Rep. (CCH) ¶ 800-890 (La. D. Ct., 19th J.D., DIV. H, June 20, 1986).

A substantial number of additional cases are now pending that challenge such discriminatory state highway tax statutes.[4] These pending but unresolved cases involve 10

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[4] *E.g.*, *ATA* v. *Conway*, No. S-95-86 WnC (Vt. Super. Ct., Washington Cty.) (challenging retaliatory tax; order entered April 14, 1986, for escrow of tax payments of approximately $650,000 annually); *ATA* v. *Conway*, No. S-147-86 WnC, [Vt.] St. Tax Rep. (CCH) ¶ 20-263 (Vt. Super. Ct., Washington Cty.) (challenging revised $50 decal tax; order entered May 29, 1986, for escrow of tax payments of approximately $6 million annually); *ATA* v. *Gray*, 709 S.W.2d 410 (Ark. 1986) (upholding constitutionality of 5 cents per mile or $175 per year tax raising approximately $25 million annually) (notice of appeal to U.S. Sup. Ct. filed June 17, 1986); *ATA* v. *Kentucky*, No. 86-CI-0464 (Ky. Cir. Ct., Franklin Cty.) ($150-$200 flat tax per truck, raising approximately $72 million annually); *ATA* v. *Kline*, No. 07-14-1667-85 MVT (N.J. Tax Ct.) ($25 per truck tax raising approximately $12 million annually); *ATA* v. *Scheiner*, 509 A.2d 838 (Pa. 1986) (upholding constitutionality of $25 per truck tax raising approximately $10 million annually and of successor tax of $36 per axle raising approximately $62 million annually) (notices of appeal to U.S. Sup. Ct. filed June 16, 1986); *Owner-Operators Independent Drivers Assoc.* v. *New Hampshire*, No. 85-E-317 (N.H. Super. Ct., Merrimack Cty.) ($20 per truck tax raising approximately $2.1 million annually); *Owner-Operators Independent Drivers Assoc.* v. *Kentucky*, No. 86-CI-0149

states and an estimated $193 million in annual highway tax liabilities, and affect the efficiency and competitive capabilities of tens of thousands of interstate motor carriers throughout the country.

Despite the prevalence of discriminatory highway tax legislation injurious to interstate motor carriers and to the policies of the Commerce Clause, state courts have manifested a growing reluctance to order restitution of taxes collected in violation of the federal Constitution. In 1986 alone, the motor carrier industry successfully challenged the constitutionality of highway taxes in three different states but was denied a tax refund in every case. In each instance a seemingly clear refund statute was given a strained and narrow interpretation in order to remove the challenged tax from its coverage.

In *Continental Trailways, Inc.* v. *Director, Division of Motor Vehicles*, 509 A.2d 769 (N.J. 1986), for example, a bus excise tax was found to discriminate on its face against interstate commerce. Although the New Jersey Supreme Court upheld the lower courts' finding of unconstitutionality, it reversed their grant of a refund.

(Ky. Cir. Ct., Franklin Cty.) ($25 per truck registration fee raising $300,000 annually); *Private Truck Council of America, Inc.* v. *Georgia*, No. D15385 (Ga. Super. Ct., Fulton Cty.) (retaliatory tax raising approximately $3.5 million annually); *Private Truck Council of America, Inc.* v. *Florida Dep't of Revenue*, No. 85-368 (Fla. Cir. Ct., Leon Cty.) (retaliatory tax raising approximately $600,000 annually); *Private Truck Council of America, Inc.* v. *Nebraska*, Doc. No. 841 (Neb. D. Ct., Lancaster Cty.) (retaliatory tax raising approximately $1 million annually); *Private Truck Council of America, Inc.* v. *New Hampshire*, No. 86-08A (N.H., argued June 10, 1986) (retaliatory tax raising approximately $200,000 annually); *Private Truck Council of America, Inc.* v. *New Jersey*, No. L85-1261 (N.J. Super. Ct., Mercer Cty., Oct. 4, 1985) (appeal pending) (upholding retaliatory tax raising approximately $4.5 million annually); *Private Truck Council of America, Inc.* v. *Oklahoma*, No. CH-84-9902 (Okla. D. Ct., Oklahoma Cty.) (retaliatory tax raising approximately $3.5 million annually).

The court determined that the State Tax Uniform Procedure Law, which provided expressly for tax refunds, was not applicable to the bus excise tax because the tax was not "collectible by the state tax commissioner." Two dissenting Justices pointed out that there was "no reason to distinguish among taxes paid to the State of New Jersey on the basis of which division of state government is the payee."

Similarly, in *Private Truck Council of America, Inc.* v. *Secretary of State, supra*, the Maine Supreme Court relied on a narrow construction of the state refund statute to deny a refund of taxes collected in violation of the Commerce Clause. Even though the refund statute (Me. Rev. Stat. Ann. tit. 36, § 152 (Supp. 1985-1986)) expressly stated that taxpayers could "pay any tax . . . without forfeiting any right to apply for a refund" and that no such tax "need be paid . . . under protest or under duress to entitle the taxpayer to apply for a refund," the court gave a crabbed construction to this broad language and ruled that the injured motor carriers should "not [be] given the benefit of the refund statute." 503 A.2d at 219-220.[5]

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[5] Justices Brennan, White, and O'Connor would have granted certiorari in this case to address a related tax refund issue. *See* 106 S.Ct. 1997. There was, however, a considerably less compelling need for review in that instance than in the present case. Because of an escrow fund that had been established when suit was filed in that case, the taxpayers were assured of receiving the lion's share of taxes wrongfully exacted. *See* 85-1423 Pet. App. 1a-3a. Here, by contrast, petitioners were refused preliminary relief before the tax went into effect and therefore were forced to pay into the State's treasury about $25 million of unlawfully exacted taxes that they cannot recover unless this Court grants review. Moreover, the petition in *Private Truck Council* principally emphasized a different point, addressing the refund question in two pages that failed to describe the substantial national impact of the growing tide of decisions of this character. As we demonstrate in this petition, the question is now ripe for review by this Court.

The Vermont Supreme Court's decisions in the instant cases represent an even more strained and illogical construction of a state refund statute. The relevant portion of Vt. Stat. Ann. tit. 23, § 3020(b) provides, without limitation, for a refund of any taxes "illegally or erroneously collected or computed." Nonetheless, the Vermont Supreme Court excluded the taxes at issue in this case from coverage of the refund statute by holding that the statute "merely provide[s] for a refund mechanism if errors are made in determining what tax is imposed." App. at 12a. The court concluded that an unconstitutional tax was not an "illegal" tax within the meaning of the refund statute and that sovereign immunity barred any refund.[6]

Although state courts have the final word on the meaning of state refund legislation, they do not have the final word on the requirements of the federal Constitution. As we demonstrate in this petition, past decisions of this Court construing the Commerce Clause and the Due Process Clause require a refund of taxes collected by the states in violation of the federal Constitution. The decision of the Vermont Supreme Court, foreclosing petitioners' right to a refund of millions of dollars of taxes exacted in violation of the Commerce Clause, conflicts with those decisions and should be reversed.

The need to resolve this conflict is compelling. Decisions such as that of the Vermont Supreme Court effec-

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[6] State resistance to restitution of taxes exacted in violation of the federal Constitution is not confined to the motor carrier industry. For example, although this Court decided that a Hawaii state tax discriminated against interstate commerce over two years ago in *Bacchus Imports Ltd.* v. *Dias*, 468 U.S. 263 (1984), the taxpayers still have not obtained any relief and are now mired in a protracted factual hearing before the Hawaii Tax Court. Other recent decisions from the state courts have blunted the taxpayers' right to a refund by applying this Court's decisions only on a prospective basis. *See, e.g., First of McAlester Corp.* v. *Oklahoma Tax Commission*, 709 P.2d 1026 (Okla. 1985); *Metropolitan Life Ins. Co.* v. *Commissioner of Insurance*, 373 N.W.2d 399 (N.D. 1985).

tively strip away the Commerce Clause rights of interstate motor carriers. Those carriers suffer years of discriminatory treatment with associated competitive disadvantages. Unless they are able to obtain refunds of taxes collected in violation of the Constitution, firms subject to discrimination are not restored to the equality with in-state businesses that the Commerce Clause demands. And without a refund requirement, the power of the Commerce Clause to deter the enactment of a series of discriminatory levies is greatly diminished, as the present case illustrates.[7] If years of costly litigation result in literally no benefit for taxpayers, they "will have little incentive to seek vindication of" their Commerce Clause rights and the states will be left free to engage in whatever forms of economic protectionism they wish, to the detriment of the important policies secured by the United States Constitution. *Owen* v. *City of Independence*, 445 U.S. 622, 651 & n.33 (1980).[8]

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[7] The Vermont Supreme Court's decision striking down the $50 decal tax at issue in this case went into effect on March 3, 1986. On April 18, 1986, the Vermont General Assembly reenacted the $50 decal tax, making it retroactive to March 3, 1986 (Adj. Sess.), No. 124 §§ 10-13 ("Act 124"), *amending and reenacting* Vt. Stat. Ann. tit. 23, §§ 415, 3007, 3010 (App., at 90a, 96a, 98a). Act 124 repealed Act 172's corresponding $50 reduction in Vermont truck registration fees. In other respects, however, Act 124 fully reinstated the $50 decal tax, notwithstanding the Vermont Superior Court's 1983 holding in *ATA II* that the decal tax unlawfully discriminated against interstate commerce apart from the $50 reduction in registration fees (App. at 59a). *American Trucking Associations, Inc.* v. *Conway*, No. S-147-86 WnC, [Vt.] St. Tax Rep. (CCH) ¶ 200-263 at 10,337 (Vt. Super. Ct. May 29, 1986). Petitioners promptly filed a new constitutional challenge to the reenacted tax in Vermont Superior Court. Relying on its 1983 decision in *ATA II*, the court found that "[n]ot only are Plaintiffs likely to succeed, they will succeed at the trial level unless, for some miraculous circumstance, the $50 use [decal] tax today does not impact in a discriminatory fashion as it did in *ATA II*." *Id.* at 10,338.

[8] A grant of certiorari in this case would not only bring before this Court an important question concerning the power of the states

II. THE VERMONT SUPREME COURT'S DECISION ERRONEOUSLY IMPAIRS RIGHTS UNDER THE COMMERCE CLAUSE AND CONFLICTS WITH THIS COURT'S HOLDINGS REQUIRING RESTITUTION OF UNCONSTITUTIONALLY EXACTED TAXES.

A. A Refund of Taxes Unconstitutionally Assessed Is Necessary to Effectuate the Commerce Clause's Prohibition of Discrimination Against Interstate Commerce.

"The very purpose of the Commerce Clause [is] to create an area of free trade among the several states." *McLeod* v. *J.E. Dilworth Co.*, 322 U.S. 327, 330 (1944). In the state tax field, "the prohibition against discriminatory treatment of interstate commerce follows inexorably from the basic purposes of the Clause." *Boston*

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to thwart federal constitutional rights by withholding any remedy for their violation and resolve an issue that is increasingly becoming the focus of much state court litigation, but it would also forestall a tendency on the part of aggrieved state taxpayers to take their disputes with the states to federal court. Congress enacted the Tax Injunction Act, 28 U.S.C. § 1341, to protect the states from federal court intervention in controversies regarding their tax systems, but only where the taxpayer has a "plain, speedy, and efficient remedy" in the state courts. The availability of adequate state refund procedures is central to the formulation. *See California* v. *Grace Brethren Church*, 457 U.S. 393, 417 (1982); *Georgia Railroad & Banking Co.* v. *Redwine*, 342 U.S. 299, 303 (1952) (state refund remedy held inadequate because it applied to less than 15% of the total taxes in controversy); *Great Lakes Dredge & Dock Co.* v. *Huffman*, 319 U.S. 293, 300-301 (1943). When states such as Vermont deny refund relief to taxpayers injured by unconstitutional tax statutes, the federal courts will inevitably be importuned with increasing numbers of requests for injunctive relief against state tax officials, a result that can be avoided if the Court grants review here and reaffirms the longstanding principle that the states are obligated to provide a means of recouping unconstitutionally exacted taxes.

Stock Exchange v. *State Tax Commission*, 429 U.S. 318, 329 (1977). A state must structure its taxes so as to put interstate "commerce actually on a plane of equality with local trade in local taxation." *Nippert* v. *City of Richmond*, 327 U.S. 416, 434 (1946).

When states have violated this basic principle of equal, non-discriminatory treatment, this Court has routinely struck down the tax under the Commerce Clause. The remedy in these cases has often been a refund or abatement of the discriminatory tax. This remedy responds directly to the evil caused by the constitutional violation by reestablishing equality between interstate and local commerce. Thus, in *Halliburton Oil Well Cementing Co.* v. *Reily*, 373 U.S. 64 (1963), the Court sustained a refund claim under the Commerce Clause for a sales and use tax scheme that discriminated against products assembled out-of-state. The refund equalized the sales and use tax burden on equipment assembled inside and outside the state. In *Best & Co.* v. *Maxwell*, 311 U.S. 454 (1940), the Court sustained a refund claim under the Commerce Clause for a privilege tax that discriminated against non-resident merchants. The refund equalized the privilege tax burden on local and out-of-state merchants. And in *I. M. Darnell & Son Co.* v. *City of Memphis*, 208 U.S. 113 (1908), the Court sustained a refund claim under the Commerce Clause for a property tax that discriminated against out-of-state property. Again, the refund equalized the property tax burden on local and out-of-state property.

Ordering refunds of a state tax exacted in violation of the Commerce Clause is, in fact, the *only* remedy that can realistically maintain the equality between interstate and local commerce that the Constitution demands. Equitable relief prior to payment of an unconstitutional tax would be effective, but it is rarely available because of the Tax Injunction Act, 28 U.S.C. § 1341, which generally

prohibits the federal district courts from enjoining, suspending or restraining the assessment, levy, or collection of any state tax. Indeed, this case illustrates the difficulty of obtaining preliminary injunctive relief. The federal district court denied ATA's motion for a temporary restraining order and preliminary injunction in *ATA I* partly on the ground that it believed Vermont law provided a refund remedy and that it therefore lacked jurisdiction under the Tax Injunction Act. App. at 86a & n.1. ATA then went to state court, which also denied preliminary injunctive relief, similarly relying on the purported availability of a refund remedy. *Id.* at 80a-81a.

Thus, a refund of taxes assessed unconstitutionally is necessary to restore out-of-state businesses to a "plane of equality" with local businesses. As Justice Holmes wrote for the Court in *Atchison, T & S.F.R.R.* v. *O'Connor*, 223 U.S. 280, 285 (1912), "[i]t is reasonable that a man who denies the legality of a tax should have a clear and certain remedy." In view of the inadequacies of injunctive relief in the state tax area, however, the Court concluded in *Atchison* that "an action at law to recover back what [the taxpayer] has paid is the [only] alternative left." *Ibid.* Unless states are required to respect that alternative, the purposes of the Commerce Clause would be frustrated, and the disparate burdens imposed on interstate commerce would continue to have economic and anticompetitive effects. Cf. *Bazemore* v. *Friday*, 54 U.S.L.W. 4972 (U.S. July 1, 1986).

Furthermore, requiring refunds of taxes imposed in violation of the Commerce Clause is essential to deterring states from repeatedly enacting unconstitutional levies. If a state were permitted to retain the benefits of a discriminatory exaction, it would have little incentive to refrain from enacting a slightly different but still discriminatory tax and collecting the new tax payments with impunity during the several additional years it might

take taxpayers to obtain a final judgment striking down the new tax. This cycle of governmental lawlessness and long, costly, futile litigation would nullify federal constitutional protections and effectively negate the Commerce Clause's prohibition of discriminatory state taxes.

Again, this case confirms that these fears are more than mere speculation. One has only to look at Vermont's highway tax activities over the past five years to confirm the reality of the problem. In the face of the Vermont Supreme Court's clear ruling in *ATA I*, Vermont, comforted with the knowledge that it would not have to refund any unconstitutional tax receipts, continued to enforce and defend a revised retaliatory tax although it was quite similar to the one found to be unconstitutional in *ATA I*. Likewise, notwithstanding the Vermont Supreme Court's recent *ATA II* decision declaring unconstitutional the State's $50 decal tax on trucks, the Vermont legislature reenacted the tax in April 1986, thus necessitating yet another lawsuit.

B. This Court Has Recognized That the Fourteenth Amendment Requires Refunds of Unconstitutional Taxes Even Where No State Refund Statute Exists.

The considerations summarized above have led this Court to hold repeatedly that a state must refund taxes exacted in violation of the Constitution. In *Ward v. Love County*, 253 U.S. 17, 24 (1920), for example, the Court held that failure to refund "unlawful taxes" paid "under compulsion" would be "arbitrar[il]y and without due process of law [and] [o]f course would be in contravention of the Fourteenth Amendment." The Court further held in *Ward* that "no statutory authority was essential to enable or require" the refund of a tax payment that was "not voluntary but made under compulsion." *Ibid.* The Court reiterated this principle in *Car-*

penter v. *Shaw*, 280 U.S. 363, 369 (1930), stating that a "denial by a state court of a recovery of taxes exacted in violation of the laws or Constitution of the United States by compulsion is itself in contravention of the Fourteenth Amendment." *See also Iowa-Des Moines Nat. Bank* v. *Bennett*, 284 U.S. 239, 247 (1931); *United States* v. *State Tax Commission*, 645 F.2d 4, 5 (5th Cir.), *cert. denied*, 454 U.S. 896 (1981) ("[t]he retention by the state of an unconstitutional tax is as much a violation of the Constitution as was the collection of the tax in the first instance"); *Gallagher* v. *Evans*, 536 F.2d 899, 900-901 (10th Cir. 1976).

The ruling of the Vermont Supreme Court cannot be squared with these decisions. As the court below correctly held (App., at 7a, 19a), the challenged Vermont taxes imposed on interstate motor carriers clearly discriminated against interstate commerce and thus ran afoul of the Commerce Clause. Moreover, there can be little doubt that those taxes were paid "under compulsion," as that term has been construed in previous cases. In *Ward* v. *Love County*, *supra*, the Court relied on *Atchison, T & S.F.R.R. Co.* v. *O'Connor*, 223 U.S. at 286, which had defined compulsion in terms of "implied duress" and "serious disadvantage[s]" to those who refuse to pay an unconstitutional tax.[9] Thus, in *Gaar, Scott & Co.* v. *Shannon*, 223 U.S. 468, 471 (1912), the Court held that payment of an illegal tax in order to avoid a penalty of 25% and loss of a license was "not voluntary but compulsory, and may be recovered back." Similarly, in *Union Pacific Railroad Co.* v. *Public Service Commission*, 248 U.S. 67, 70 (1918), the Court concluded that a fee charged by a state for a certificate authorizing a carrier to issue bonds had been paid "under duress" because the certificate was a "commercial necessity" and the threat-

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[9] This Court, in *United States* v. *State Tax Commission*, 412 U.S. 363, 368 n.11 (1973), recently cited with approval the test of business compulsion developed in *Ward* and *Atchison*.

ened penalties for nonpayment were worse than the fee itself. And in *United States* v. *Bethlehem Steel Corp.*, 315 U.S. 289, 327 (1942), the Court stated that "[t]he courts generally regard the dilemma of the taxpayer who must either pay the taxes or incur serious business losses as a species of duress."

Under this standard, the tax payments in the present cases were plainly made involuntarily and under compulsion or duress. In order to conduct their interstate business operations, motor carriers were required to utilize Vermont's roads. Vermont conditioned the use of its roads on the payment of illegal, discriminatory taxes. Motor carriers were thus faced with either (i) paying the tax under protest; (ii) totally discontinuing their interstate business in and through Vermont; or (iii) continuing their business while refusing to pay the tax, thereby subjecting themselves to the disruption, inconvenience, and expense attendant to Vermont's enforcement activities. Associated with those enforcement activities were heavy civil and criminal penalties for noncompliance.

Failure to comply with the entry fee tax system would have subjected motor carriers to two separate penalties for each unreported entry into the State. Vt. Stat. Ann. tit. 23, § 421 (Supp. 1985) levied fines of $100 to $250 for a first violation and $250 to $500 or 30 days' imprisonment for every subsequent violation of the $40 annual permit requirement of Section 415. Additionally, Vt. Stat. Ann. tit. 23, § 417(b) (Supp. 1982), *as amended by* 1981, No. 87, § 19, imposed a $40 fine for every violation of the per entry charge of Section 417(a). Violation of the $50 decal tax provisions would have subjected motor carriers to the penalty provisions of Vt. Stat. Ann. tit. 23, § 421 (Supp. 1985), as stated above, as well as the penalties provided by Vt. Stat. Ann. tit. 23, § 3024 (Supp. 1985), which imposed a fine of up to $5000 or one year imprisonment under Section 3024(a) and a $500 to $2000 fine under Section 3024(c).

Since individual motor carriers send trucks into Vermont hundreds or even thousands of times per year, these penalties for noncompliance could have amounted to hundreds of thousands of dollars. Payment of unconstitutional taxes against the threat of such heavy monetary sanctions or even imprisonment cannot be considered voluntary. Here, it is little wonder that motor carriers chose to pay the unconstitutional taxes under protest rather than jeopardize their business interests by incurring the "serious disadvantage" and "serious business losses" associated with non-payment. *See Union Pacific Railroad Co.* v. *Public Service Commission of Missouri*, 248 U.S. 67, 70 (1918) ("It is always for the interest of a party under duress to choose the lesser of two evils. But the fact that a choice was made according to interest does not exclude duress.").

C. The Refund of Unconstitutional Taxes Required By the Constitution Is Not Barred By Principles of Sovereign Immunity.

As we have shown, because the unconstitutional retaliatory tax payments were exacted involuntarily and under compulsion or duress, they must be refunded. The Vermont Supreme Court nonetheless refused to allow this remedy by relying on the doctrine of sovereign immunity. The court below stated that "[t]his action for a tax refund is a suit against the state, and therefore, is barred by sovereign immunity unless the state has waived its immunity." App. 11a. The court then rejected the argument that the Vermont tax refund statute constitutes a waiver of sovereign immunity by construing that statute to apply only where "errors are made in determining what tax is imposed" and not where "amounts [are] paid to the state under a statute later declared invalid." *Id.* at 12a.

The Vermont Supreme Court's application of sovereign immunity is misguided for a number of reasons. First, this Court already has determined that, in the context of

unconstitutional taxes, the Constitution *requires* repayment, notwithstanding state rules to the contrary. Second, the Eleventh Amendment cases cited by the Vermont Supreme Court do not bolster its sovereign immunity holding. In fact, the Eleventh Amendment has nothing to do with this case. It merely prohibits *federal* courts from entertaining a suit against a state without its consent; by its terms the Amendment has no application to *state* court jurisdiction or remedies. Indeed, the absence of a federal forum only emphasizes the need for state courts to provide effective relief for constitutional violations. *See* Wolcher, *Sovereign Immunity and the Supremacy Clause: Damages Against States in their Own Courts For Constitutional Violations*, 69 Calif. L. Rev. 189, 315 (1981):

> Under current doctrine, the federal courts are powerless to give adequate relief. But the state courts are not equally powerless. On the contrary, the supremacy clause tells them they must give these claimants a hearing on their claim to a constitutional remedy against the state. And in that hearing, state judges must cast aside state law, including sovereign immunity, if it is inconsistent with the commands of the Constitution.

See also General Oil Co. v. *Crain*, 209 U.S. 211, 226 (1908), holding, in a case challenging state taxes under the Commerce Clause, that if redress in federal court is barred by the Eleventh Amendment, and if redress "may be forbidden by a State [in] its Courts," it "must be evident that an easy way is open to prevent the enforcement of many provisions of the Constitution."

Moreover, notions of sovereign immunity have little relevance to suits for a refund of money or property unconstitutionally exacted. The doctrine of sovereign immunity is intended to safeguard the treasury against unauthorized and unexpected expenditures that might threaten the public fisc. *See FCIC* v. *Merrill*, 332 U.S.

380, 385 (1947). Whatever the force of this concern in a suit for damages, it is quite beside the point in a claim for restitution. As Professor Wolcher has observed, "a state has little legitimate reason to object to a constitutionally implied remedy in state court in cases where the plaintiffs seek the return of property or the refund of money that the state has unconstitutionally taken from them." Wolcher, *supra*, 69 Calif. L. Rev. at 309. In that situation, the state "is only being asked to pay back money which the plaintiff claims it had no right to collect in the first place. The action in substance represents a claim of unjust enrichment against the state that does not threaten the integrity of its general revenues." *Id.* at 310. *See Ward* v. *Love County*, 253 U.S. at 24; *Poindexter* v. *Greenhow*, 114 U.S. 270, 286, 296-297 (1885) (holding that state sovereign immunity is overridden by the Contract Clause and ordering restitution of property held by the state).

In these circumstances, it is wholly inappropriate, and wholly incompatible with the Commerce and Supremacy Clauses, to allow a state to impose a tax that blatantly discriminates against interstate commerce in violation of the Constitution and then to interpose state law defenses as a reason for refusing to refund the tax and thereby to eliminate the constitutional violation. This Court should grant review to consider the correctness of this anomalous result, ordained by the Vermont Supreme Court.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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No. 86-69

IN THE
Supreme Court of the United States
OCTOBER TERM, 1986

AMERICAN TRUCKING ASSOCIATIONS, INC., *et al.*,
Petitioners

v.

WILLIAM CONWAY, *et al.*,
Respondents

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF VERMONT

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APPENDIX A

SUPREME COURT OF VERMONT
NOVEMBER TERM, 1984

No. 83-484

AMERICAN TRUCKING ASSOCIATIONS, INC., CHEMICAL LEAMAN TANK LINE[S], INC. and ANDERSON TRUCKING SERVICE, Individually and on behalf of all others similarly situated

v.

WILLIAM CONWAY, Commissioner of Motor Vehicles; PAUL PHILBROOK, Vermont Commissioner of Public Safety; RICHARD SNELLING, Governor of State of Vermont and THOMAS EVSLIN, Secretary of Vermont Agency of Transportation

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[Filed Feb. 21, 1986]

On appeal from Washington Superior Court

James L. Morse, J.

Ralph A. Foote, Robert H. Moyer, and Charles Starbuck of Conley and Foote, Middlebury, for plaintiffs-appellees

John J. Easton, Jr., Attorney General, and Zander B. Rubin and Robert C. Schwartz, Assistant Attorneys General, Montpelier, for defendants-appellants

PRESENT: Allen C.J., Hill, Underwood, Peck and Gibson, JJ.

PECK, J. The defendants appeal an order of the Washington Superior Court declaring unconstitutional statutes imposing fuel user license fees, 23 V.S.A. §§ 415, 3007, and trip permit fees or temporary authorization fees, 23 V.S.A. § 3010, on foreign-registered trucks. The lower court found that these statutes, challenged by plaintiffs in a class action,[1] violated the Commerce Clause of the United States Constitution by discriminating against interstate commerce. The court held the statutes unconstitutional because under the statutory scheme foreign truck owners or operators must pay certain fees which are not offset by complementary domestic or foreign taxes on Vermont-registered trucks.

Defendants appeal, alleging, first, that the trial court sitting in equity and consisting of a presiding judge and an assistant judge, had no jurisdiction to hear the case; and second, the fees imposed pursuant to the challenged statutes do not violate the Commerce Clause of the United States Constitution. We disagree and affirm the trial court's decision.

The plaintiffs also appeal the lower court's order denying platinffs' motion for a court-ordered refund of any

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[1] Pursuant to a stipulation filed with the superior court, the named plaintiffs represent:

> the class of all interstate motor carriers whose base truck registrations are issued by jurisdictions other than the State of Vermont (that is the persons owning or operating motor trucks upon the highways of the State not registered or required to be registered in this State, in the language of 23 V.S.A. § 3007(b)), and who are now or may in the future become subject to the requirements and liable for payment of the fees set forth in 23 V.S.A. §§ 415, 3007, and 3010 and section 15(c), all as enacted and amended pursuant to Number 172 of the Acts of the 1982 (1981 adjourned) session of the Vermont Legislature.

fees, fines or penalties collected pursuant to the objectionable statutes. We affirm the denial of a refund.

In 1982 this Court considered another challenge to the constitutionality of certain fees imposed by Vermont on foreign-registered trucks. *American Trucking Associations, Inc. v. Conway*, 142 Vt. 17, 451 A.2d 42 (1982). There the plaintiff class challenged a fee system imposed by 23 V.S.A. §§ 415-419 (Cum. Supp. 1982) (Act 87).[2]

In the earlier case, this Court vacated the judgment of the lower court, which had upheld the fee system imposed under Act 87, and remanded for further factual findings. *Id.* at 23, 451 A.2d at 45. During the pendency of the appeal of that case, *American Trucking Associations, Inc., supra*, the Vermont legislature amended the fee system for foreign trucks by 1982, No. 172 (Adj. Sess.) now codified at 23 V.S.A. §§ 415-423 (Cum. Supp. 1982) (Act 172). *American Trucking, supra*, 142 Vt. at 19, 451 A.2d at 43. In this case, we consider the validity of the fee system imposed under Act 172.

Act 172 provides that owners or operators of trucks weighing 18,000 pounds or more, and operated on Vermont highways, whether registered in the state or not,

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[2] We summarized Act 87:

> Act No. 87 required operators of trucks with a gross weight of 18,000 pounds or more which were registered outside of Vermont to obtain a permit, costing $40, for each truck that would be owned or operated in Vermont. *Id.* at § 18 (codified at 23 V.S.A. § 415 (Cum. Supp. 1982)). In addition, a fee was charged for each time a foreign-registered truck entered the state. The entry fee was $15, with a surcharge of $10 if the foreign truck was registered in a state that imposed more than one tax on trucks using its highways. *Id.* at § 19 (codified at 23 V.S.A. § 417 (Cum. Supp. 1982)). In lieu of these two charges, operators could purchase a single trip permit, which authorized a single entry into Vermont for a fee of $40. *Id.* at § 18a (codified at 23 V.S.A. § 415a (Cumm. Supp. 1982).

American Trucking Associations, Inc. v. Conway, supra, 142 Vt. at 18, 451 A.2d at 42.

must either: (1) pay a $50.00 annual fuel user's license fee, 23 V.S.A. §§ 415, 3007; (2) acquire a "single trip permit," costing $50.00, 23 V.S.A. § 3010(a); or, (3) acquire a "temporary authorization" costing $50.00, 23 V.S.A. § 3010(b). There is no dispute that each of the above-mentioned statutes would produce the same effect—owners or operators of trucks weighing 18,000 or more must pay $50.00 to use Vermont highways. For the purposes of this opinion, any reference to the "$50.00 user fee" is a reference to all three of the challenged statutes, 23 V.S.A. §§ 415, 3007 and 3010(a), (b). In an amendment to the motor vehicle registration provision, Act 172 reduced by $50.00 the annual registration fee owed by owners of Vermont-registered trucks weighing 18,000 pounds or more. 23 V.S.A. § 367.

Plaintiffs sought declaratory and injunctive relief, contending that the fees imposed, under Act 172, on out-of-state trucks constituted an unlawful burden on interstate commerce and otherwise violated their rights under the Commerce Clause of the United States Constitution, the Supremacy Clause of the United States Constitution, the Revised Interstate Commerce Act, 49 U.S.C. § 10101 et seq., the Fourteenth and Fifth Amendments to the United States Constitution, the Privileges and Immunities Clause of the United States Constitution, and Article 9 of Chapter I of the Vermont Constitution. In addition to the request for injunctive and declaratory relief, plaintiffs sought repayment by the State of any fees collected pursuant to the challenged statutes.

When it considered the challenged statutes in conjunction with the registration fee refund of $50.00 which benefited only Vermont-registered trucks, 23 V.S.A. § 367, the trial court ruled that the statutes, 23 V.S.A. §§ 415, 3007 and 3010, all violated the Commerce Clause of the United States Constitution. However, the lower court neither discussed nor decided plaintiffs' other claims. In a motion to alter judgment, plaintiffs requested that the

fees already collected under Act 172 be refunded. The court denied the motion. Defendants filed a timely appeal of the court's order declaring the statutes unconstitutional, while plaintiffs appealed the court's order denying them monetary relief.

I.

Defendants' first claim on appeal is that the judgment is void for lack of jurisdiction, given the presence of an assistance judge during the adjudication of equitable matters. Under *Soucy v. Soucy Motors, Inc.*, 143 Vt. 615, 620, 471 A.2d 224, 227 (1983), this fact would require reversal. In *Solomon v. Atlantis Development, Inc.*, 145 Vt. 70, 74-76, 483 A.2d 253, 256-57 (1984), however, we held that *Soucy* will be applied prospectively only. Because the court decided this case prior to December 12, 1983, the date *Soucy* was issued, this case is not subject to reversal under *Soucy*.

Nevertheless, under our law prior to *Soucy*, the presence of assistant judges in cases in equity could require reversal. See *Maskell v. Beaulieu*, 140 Vt. 75, 453 A.2d 699 (1981); *Pockett v. LaDuke*, 139 Vt. 625, 432 A.2d 1191 (1981). Here, however, the case was decided on stipulated facts, so there was no hearing and no fact-finding by the assistant judge. In *Brower v. Holmes Transportation, Inc.*, 140 Vt. 114, 435 A.2d 952 (1981), we determined that the assistant judges' presence did not constitute an improper influence "where only a legal ruling as to summary judgment is involved." *Id.* at 118, 435 A.2d at 954. Therefore, the unanimous decision based upon stipulated facts submitted without a hearing does not require reversal under pre-*Soucy* law.

II.

Next we consider defendants' claim that the trial court erred when it ruled the challenged statutes unconstitutional under the Commerce Clause of the United States Constitution.

Initially, we must consider defendants' contention that the lower court improperly applied the test of *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274 (1977). Defendants contend that *Complete Auto*'s test only applies to commerce clause challenges to statutes which impose taxes on the privilege of doing business in the state, not "use" taxes. The proper test in our case, according to defendant, is the one employed in the pre-*Complete Auto* line of cases known as "flat fee" cases. See, e.g., *Capitol Greyhound Lines v. Brice*, 339 U.S. 542 (1950); *Aero Mayflower Transit Co. v. Board of Railroad Commissioners*, 332 U.S. 495 (1947); *Aero Mayflower Transit Co. v. Georgia Public Service Commission*, 295 U.S. 285 (1935). The third prong of the *Complete Auto* test—whether the tax discriminates against interstate commerce—is also an element of the test employed in the flat fee cases. See, e.g., *Aero Transit Co., supra*, 332 U.S. at 501-03. The challenged components of Act 172 fail to survive scrutiny under this "discrimination" element or prong; therefore, it does not matter which test is applied.

The trial court ruled that the challenged statutes, 23 V.S.A. §§ 415, 3007 and 3010, violated the Commerce Clause of the United States Constitution, in part, because the tax discriminates against interstate commerce. The United States Supreme Court has ruled that a state tax is not *per se* invalid because it burdens interstate commerce as interstate commerce may be made to pay its way. *Maryland v. Louisiana*, 451 U.S. 725, 754 (1981). Nevertheless,

> [o]ne of the fundamental principles of Commerce clause jurisprudence is that no State, consistent with the Commerce Clause, may "impose a tax which discriminates against interstate commerce . . . by providing a direct commercial advantage to local business." *Northwestern States Portland Cement Co. v. Minnesota*, 358 U.S. 450, 458 (1959). See

> *Boston Stock Exchange v. State Tax Comm'n*, 429 U.S. 318, 329 (1977). This antidiscrimination principle "follows inexorably from the basic purpose of the Clause" to prohibit the multiplication of preferential trade areas destructive of the free commerce anticipated by the Constitution. *Boston Stock Exchange, supra.* See *Dean Milk Co. v. Madison*, 340 U.S. 349, 356 (1951) .

Id. at 754. The challenged provisions of Act 172 discriminate against interstate commerce by providing a direct commercial advantage to Vermont truckers. See *Westinghouse Electric Corp. v. Tully*, 104 S. Ct. 1856, 1865-68 (1984). The trial court noted that, in considering the user fee requirements of the Act, it could not "but be aware of the consequences of the most recent amendments to the licensing and registration statutes," also part of the Act. We, too, are unable to ignore the registration statute and its effect. Act 172 not only imposed the annual $50.00 fees which have been directly challenged; but it also reduced by $50.00 the registration fee owed by Vermont truck operators or owners with trucks weighing 18,000 pounds or over, who would otherwise be subject to the challenged $50.00 fee. The registration fee reduction shifts the entire impact of the user fee legislation onto foreign operators, thereby discriminating against them.

We note that foreign truck owners who have complied with their home state registration requirements need not register their trucks in Vermont if the operators' home jurisdictions afford Vermont-registered trucks the same benefit. 23 V.S.A. § 411. The parties stipulated to the fact that virtually all United States jurisdictions have similar reciprocity and registration provisions. Thus, as stipulated, virtually all motor trucks pass freely in interstate commerce if they have complied with their home state registration requirements. But, if the challenged Act were given effect, foreign truck operators, in the class subject to the fees, would be burdened with an additional

cost of doing business if they decided to use Vermont highways. Vermont truckers, on the other hand, would be effectively exempt from the additional fees imposed by Act 172.

One might argue that any foreign-registered truck owner or operator could take advantage of the credit allowed Vermont truckers by simply registering their trucks in Vermont. That is, members of the plaintiff class, whose trucks are already registered in their home states, could avoid the Vermont use taxes challenged here by registering their trucks in Vermont. However, if Vermont could impose such a tax, then so could every other state throughout the nation. *National Bellas Hess, Inc. v. Department of Revenue*, 386 U.S. 753, 759 (1967). One can hardly imagine a result more "destructive of the free commerce anticipated by the Constitution." *Maryland v. Louisiana, supra*, 451 U.S. at 754. If, in order to avoid paying user fees in other states they entered, truckers were required to register their trucks in those other states, the cost of doing interstate business would be greatly increased thereby burdening interstate commerce.

Defendant also argues that the Vermont registration fees, as well as purchase and use taxes, paid by Vermont truckers are complementary and therefore offset the user fees. We disagree. Vermont has statutorily exempted foreign truckers from the registration fees, 23 V.S.A. § 411, and the purchase and use tax, 32 V.S.A. §§ 8902 (2) and 8903(a), (b). When a Vermont trucker pays his registration fee and his purchase and use tax, the Vermont trucker, by virtue of the reciprocity agreements, purchases the right to operate in other states as well as Vermont. See *American Trucking Associations, Inc. v. Quinn*, 437 A.2d 623, 627 (Me. 1981). On the other hand, under Act 172 when a foreign trucker pays the challenged user fee, he only buys the right to use Vermont roads; however, he already contributed indirectly

to the Vermont highway maintenance fund by virtue of reciprocity. *Id.* Act 172 forces foreign-based truckers to pay yet another fee for the use of Vermont highways without also enacting the same fee from Vermont truckers. We affirm the lower court's decision that provisions of Act 172, 23 V.S.A. §§ 415, 3007 and 3010, are unconstitutional and unenforceable.

III.

We now turn to plaintiffs' appeal of the trial court's decision denying plaintiffs' request for repayment of fees, fines or penalties collected pursuant to the objectionable statutes.

As noted above, in their prayer for relief, plaintiffs asked that the lower court order defendants to repay plaintiffs any fees or penalties "wrongfully, illegally or unconstitutionally collected pursuant to the challenged statutes." Further, the parties stipulated that if parts of Act 172 were declared unconstitutional, any fees or penalties "wrongfully or illegally obtained by the State of Vermont . . . may be refunded pursuant to 23 V.S.A. § 3020, . . . 23 V.S.A. § 328 or in any other manner ordered by such court." In its initial order of July 27, 1983, the trial court failed to address the refund issue. In response to plaintiffs' subsequent motion to alter judgment, the lower court denied plaintiffs' refund request for three reasons. The court indicated that (1) because its jurisdictional power was confined to declaring the rights of the parties and ordering prospective relief, a declaratory judgment was sufficient without the need for injunctive relief; (2) a monetary judgment was barred by the doctrine of sovereign immunity; and, (3) while the superior court recognized that it could conduct a de novo review of a decision of the Commissioner of Motor Vehicles, 23 V.S.A. § 3023, there was no such decision by the Commissioner in this case.

At the outset, we note that the stipulation regarding the refund, quoted above, provides little assistance in resolving this issue. The stipulation represented an agreement that, should the superior court or higher court declare Act 172 unconstitutional *and* should that court order the state to repay fees and penalties, the refund would be made "pursuant to 23 V.S.A. § 3020 . . . 23 V.S.A. § 328 or in any other manner ordered by such court." Thus, it cannot be argued that by stipulation the defendants conceded that the superior court had to refund the collected fees if it declared the statute invalid. Rather, the stipulation only recites possible repayment methods *should* the named courts order the refund. This stipulation has no effect until a court orders the refund of the taxes. This we decline to do.

We base our decision on sovereign immunity. In Vermont, the State cannot be sued without its consent for injuries resulting from the exercise of functions essentially governmental in character. *Stoneman v. Vergennes Union High School District #5*, 139 Vt. 50, 53, 421 A.2d 1307, 1309 (1980). The imposition of a tax on fuel users for highway maintenance is an essential governmental activity, which could be performed only by a governmental entity. See *Dugan v. City of Burlington*, 135 Vt. 303, 304-05, 375 A.2d 991, 992 (1977), *Haselhuhn v. Huron-Clinton Metropolitan Authority*, 106 Mich. App. 461, 468, 308 N.W.2d 190, 193 (1981).

However, suits challenging the constitutionality of a state statute or its enforcement are not considered suits against the State for purposes of sovereign immunity. *Larson v. Domestic & Foreign Commerce Corp.*, 337 U.S. 682, 690-91 (1949); *Stoneman, supra*, 139 Vt. at 53, 421 A.2d at 1309 (1980). But an action to recover money which would be payable from state funds may be barred as a suit against the State. *Larson, supra*, 337

U.S. at 691 n.11; see also *Agency of Environmental Conservation v. Casella*, 142 Vt. 503, 505, 457 A.2d 633, 634 (1983).

This distinction is grounded in the principle of sovereign immunity that the state legislature should determine the State's liability for money judgments. "It is inherent in the nature of sovereignty not to be amenable to the suit of an individual *without its consent.*" The Federalist No. 81, at 511-12 (A. Hamilton) (Wright ed. 1961) (emphasis in original).

The United States Supreme Court's analysis of when a suit is against a state for Eleventh Amendment purposes also supports this distinction. See e.g., *Quern v. Jordan*, 440 U.S. 332, 337-38 (1979) (federal court's power is limited to prospective relief and may not include a retroactive award payable from the state treasury); *Edelman v. Jordan*, 415 U.S. 651, 663 (1974) (retroactive award of disability benefits wrongfully withheld barred as a suit against the state); *Ford Motor Co. v. Department of Treasury*, 323 U.S. 459, 463 (1945) (suit for a refund of taxes allegedly collected in violation of the Commerce Clause is a suit against the state).

This action for a tax refund is a suit against the state, and therefore, is barred by sovereign immunity unless the State has waived its immunity. Appellees argue that 23 V.S.A. § 3020(b) is a waiver of sovereign immunity which would compel a refund in this case.

23 V.S.A. § 3020(b) provides:

> If the commissioner determines that a tax, penalty, interest or fee required by this chapter has been paid more than once by a licensee, or has been illegally or erroneously collected or computed, the excess amount paid or collected shall be credited to the tax account of the licensee . . . . Any balance of the excess amount remaining in the licensee's account

> after crediting the overpayment shall be refunded if requested . . . .

This section has the clear purpose of redressing errors in the enforcement or implementation of the diesel fuel tax. It merely provides for a refund mechanism if errors are made in determining what tax is imposed. "Although it has been stated that 'the courts will adjudge monetary claims founded upon statute, because the Legislature has inferentially indicated an intent to provide the sums needed to make good the statutory scheme', in this case such an inference is negated by the fact that the Legislature denied funding." *Stoneman, supra,* 139 Vt. at 54, 421 A.2d at 1310 (citation omitted). Here, the Vermont legislature has not inferentially indicated its intent to provide the amounts paid to the state under a statute later declared invalid. The legislature may be presumed to rely on the receipt of tax revenues received from valid properly administered enactments. The power to levy taxes and appropriate the resulting funds is a fundamental attribute of sovereignty. That power would be sorely compromised if private citizens were able to do what the executive branch may not do—spend state funds without legislative appropriation. "Where no appropriation has been made, no action for a money judgment can be maintained." *Id.* Therefore, we affirm the denial of a refund of taxes collected under Act 172.

Affirmed.

FOR THE COURT:

/s/ Louis P. Peck
Associate Justice

APPENDIX B

SUPREME COURT OF VERMONT
NOVEMBER TERM, 1984

Supreme Court Docket No. 83-484

ENTRY ORDER

AMERICAN TRUCKING ASSOCIATIONS, INC., CHEMICAL LEAMAN TANK LINE[S], INC. and ANDERSON TRUCKING SERVICE, Individually and on behalf of all others similarly situated

v.

WILLIAM CONWAY, Commissioner of Motor Vehicles; PAUL PHILBROOK, Vermont Commissioner of Public Safety; RICHARD SNELLING, Governor of State of Vermont and THOMAS EVSLIN, Secretary of Vermont Agency of Transportation

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[Filed Feb. 21, 1986]

Appealed From Washington Superior Court
Docket No. S-185-82WnC

In the above entitled cause the Clerk will enter:

Affirmed.

FOR THE COURT:

/s/ Louis P. Peck
LOUIS P. PECK
Associate Justice

Concurring:

/s/ Frederic W. Allen
FREDERIC W. ALLEN
Chief Justice

/s/ William C. Hill
WILLIAM C. HILL
Associate Justice

/s/ Wynn Underwood
WYNN UNDERWOOD
Associate Justice

/s/ Ernest W. Gibson III
ERNEST W. GIBSON III
Associate Justice

APPENDIX C

SUPREME COURT OF VERMONT

APRIL TERM, 1985

No. 83-452

AMERICAN TRUCKING ASSNS., INC., INTERNATIONAL TRANSPORT, INC., HARNUM, B.H., INC., Individually and on behalf of all others similarly situated

v.

WILLIAM CONWAY, Comm'r., Motor Vehicles, PAUL PHILBROOK, Comm'r., Public Safety, RICHARD SNELLING, Governor, State of Vermont, and THOMAS EVSLIN, Secretary, Agency of Transportation, each individually and in their official capacities

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[Filed Feb. 21, 1986]

On Appeal from Washington Superior Court

Edwin H. Amidon, Jr., J., Acting Superior Judge

Ralph A. Foote, Robert H. Moyer, and Charles Starbuck of Conley and Foote, Middlebury, for plaintiffs-appellants

Jeffrey L. Amestoy, Attorney General, and Robert C. Schwartz, Assistant Attorney General, Montpelier, for defendants-appellees

PRESENT: Allen, C.J., Hill, Peck, Gibson and Hayes, JJ.

PECK, J. This is an appeal by the plaintiff class [1] from the November 16, 1983, judgment order of the Washington Superior Court, which dismissed plaintiffs' action with prejudice. Plaintiffs had challenged the constitutionality of a set of statute which authorized the imposition of certain fees upon truck owners or operators whose trucks were not registered in Vermont. The trial court upheld the fee system as constitutional. We reverse.

Vermont adopted the challenged fee system in 1981. 23 V.S.A. §§ 415-419 (Cum. Supp. 1982) (Act 87). We have previously summarized Act 87:

> Act No. 87 required operators of trucks with a gross weight of 18,000 pounds or more which were registered outside of Vermont to obtain a permit, costing $40 for each truck that would be owned or operated in Vermont. *Id.* at § 18 (codified at 23 V.S.A. § 415 (Cum. Supp. 1982)). In addition, a fee was charged for each time a foreign registered truck entered the state. The entry fees was $15, with a surcharge of $10 if the foreign truck was registered in a state that imposed more than one tax on trucks using its highways. *Id.* at § 19 (codified at 23 V.S.A. § 417 (Cum. Supp. 1982)). In lieu of these two charges, operators could purchase a single trip permit, which authorized a single entry into Vermont for a fee of $40. *Id.* at § 18a (codified at 23 V.S.A. § 415a (Cum. Supp. 1982)). None of these fees were assessed against Vermont registered trucks.

American Trucking Associations, Inc. v. Conway, 142 Vt. 17, 18-19, 451 A.2d 42, 42-43 (1982). The fees were paid into the "Transportation Fund" for construction and maintenance of Vermont highways.

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[1] The members of the plaintiff class were defined by court order as "all interstate motor carriers primarily registered outside of the State of Vermont and now or during pendency of this action subject to payment of fees prescribed by 23 V.S.A. § 415, § 415a and § 417."

In 1981 plaintiffs attacked Act 87 on constitutional grounds, alleging, among other things, that the fee system violated the Commerce Clause of the United States Constitution. Plaintiffs requested declaratory, injunctive and monetary relief. The trial court held the fee system constitutional and plaintiffs appealed. This Court vacated the judgment of the lower court and remanded for additional findings of fact. *Id.* at 23, 451 A.2d at 45. On remand the trial court again declared the Act constitutional. The new judgment was based, in part, on a stipulation of the parties adopted in the original court decree, the findings as amended, and the original conclusions of law. The stipulation included an agreement that:

> But for the registration fees provided for in 23 V.S.A. 367 and 23 V.S.A. 371 (a), the purchase and use taxes [32 V.S.A. § 9701-9818] assessed by the State of Vermont, and the gasoline fuel taxes assessed on fuels purchased in the State of Vermont, carriers whose motor vehicles are registered in the State of Vermont pay no fees, taxes or other asessments to the State of Vermont for the operation of their motor trucks within the boundaries of Vermont.

The original findings included:

> All of the United States jurisdictions impose registration licensure on the domiciliary motor trucks. It is thus a fact that virtually all motor trucks pass freely, as far as compliance with registration requirements is concerned, in interstate commerce throughout the nation if they have complied with the registration requirements of their state of domicile.

The trial court held the fee system imposed under Act 87 did not discriminate against interstate commerce because it operates as a compensation tax. In effect, the court held that the Act 87 fees imposed on foreign-registered truckers were offset by, or served to compensate for, the fees imposed on *only* Vermont registered truckers—

registration fees, 23 V.S.A. § 367, and the purchase and use taxes, 32 V.S.A. §§ 9701-9818.

The fees imposed by Act 87 are not "compensatory" and are violative of the Commerce Clause. A state tax "is not *per se* invalid because it burdens interstate commerce since interstate commerce may constitutionally be made to pay its way." *Maryland v. Louisiana*, 451 U.S. 725, 754 (1981). Nevertheless, the state's right to tax interstate commerce is limited. Two tests have been employed by the United States Supreme Court in considering the constitutionality of taxes affecting interstate commerce. The parties disagree as to which test should be applied.[2] To survive a Commerce Clause challenge under either test, the state-imposed tax must not discriminate against interstate commerce. We need not decide which test applies as Act 87 fails under the discrimination prong of both.

As indicated by the Supreme Court:

> One of the fundamental principles of Commerce Clause jurisprudence that no State, consistent with the Commerce Clause, may "impose a tax which discriminates against interstate commerce . . . by providing a direct commercial advantage to local busi-

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[2] The proper test, according to plaintiffs, is the one announced in *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274, 287 (1977):

1. Is the taxed activity sufficiently connected to the State to justify a tax?
2. Is the tax fairly related to benefits provided the taxpayer?
3. Does the tax discriminate against interstate commerce?
4. Is the tax fairly apportioned?

On the other hand, defendant contends the proper test is the one employed in a pre-*Complete Auto* line of cases known as "flat fee" cases. See, e.g., *Capitol Greyhound Lines v. Buce*, 339 U.S. 542 (1950); *Aero Transit Co. v. Comm'rs*, 332 U.S. 495 (1947); *Aero Mayflower Transit Co. v. Georgia Public Service Comm'n*, 259 U.S. 285 (1935).

> ness." *Northwestern States Portland Cement Co. v. Minnesota*, 358 U.S. 450, 458 (1959). See *Boston Stock Exchange v. State Tax Comm'n*, 429 U.S. 318, 329 (1977). This antidiscrimination principle "follows inexorably from the basic purpose of the Clause" to prohibit the multiplication of preferential trade areas destructive of the free commerce anticipated by the Constitution. *Boston Stock Exchange, supra.* See *Dean Milk Co. v. Madison*, 340 U.S. 349, 356 (1951).

Maryland v. Louisiana, supra, 451 U.S. at 754.

The defendants apparently conceded that all members of the plaintiff class are engaged in interstate commerce. On the other hand, for the purpose of this case, Vermont-registered trucks constitute an element of local or intrastate commerce. Given this fact, we conclude Act 87 on its face discriminates against interstate commerce and violates the Commerce Clause. In *American Trucking Associations, Inc. v. Quinn*, 437 A.2d 623, 627 (Me. 1981), a statute requiring foreign trucks in Maine to pay much higher permit fees than Maine truckers was ruled facially discriminatory and violative of the Commerce Clause. Similarly, under Act 87 foreign-registered truckers must pay the fees while Vermont-registered truckers and their customers are protected from the impact of the tax. Members of the plaintiff class are at a competitive disadvantage. It is true that the members of the plaintiff class need pay neither Vermont registration fees, 23 V.S.A. § 411[3], nor the sales and use

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[3] Any motor vehicle owned by a nonresident shall be considered registered in Vermont if the nonresident owner has complied with the laws of his home state. This exemption only applies to the extent that the laws of the nonresident's home state grant similar exemptions to Vermont-registered motor vehicle owners and operators. Since the members of the plaintiff class have all complied with their home state registration requirements, they need not register in Vermont unless their home states do not grant similar privileges to Vermonters.

taxes, 32 V.S.A. § 8903[4]. They need not pay these fees and taxes *only because* they have registered their vehicles, and therefore paid their registration fees, in their home state. Having thus waived the right to impose either the sales and use tax or the registration fee upon foreign-registered trucks, Vermont may not point to those taxes as complementary for the purpose of saving an otherwise discriminatory tax. As the Maine Supreme Judicial Court said:

> When an owner or operator of a Maine-based truck pays his registration fee, he purchases the right to operate in any of 46 states; the highway use fee set by section 246-A, by contrast, buys for the foreign-based truck only the right to use Maine roads. In a practical economic sense, reciprocity represents an indirect contribution by foreign-based trucks to the treasury of the State of Maine; the agreement of their home states not to tax Maine-based trucks leaves Maine free to collect more than it otherwise could from its own truckers.

American Trucking Associations, Inc. v. Quinn, 437 A.2d at 627.

When the members of the plaintiff class registered in their home states they purchased the right to operate in states like Vermont with registration reciprocity similar to that embodied in 23 V.S.A. § 411. Just like the plaintiffs in Maine, the members of the plaintiff class have already indirectly contributed to Vermont's treasury by virtue of this reciprocity. Thus, the sales and use taxes and the registration fees imposed on Vermont truckers are not complementary to and do not save the facially discriminatory provisions of Act 87.

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[4] Members of the plaintiff class need not pay the purchase and use tax because they have never registered their vehicles in the State of Vermont.

Plaintiffs' claim for monetary relief is controlled by our opinion in *American Trucking Associations, Inc. v. Conway*, —— Vt. ——, 508 A.2d 408 (1986), in which we held that sovereign immunity barred a similar claim. Accordingly, we deny this claim for monetary relief.

FOR THE COURT:

/s/ Louis P. Peck
Associate Justice

APPENDIX D

SUPREME COURT OF VERMONT
APRIL TERM, 1985

ENTRY ORDER

Supreme Court Docket No. 83-452

AMERICAN TRUCKING ASSNS., INC., INTERNATIONAL TRANSPORT, INC., HARNUM, B.H., INC., Individually and on behalf of all others similarly situated

v.

WILLIAM CONWAY, Comm'r., Motor Vehicles, PAUL PHILBROOK, Comm'r., Public Safety, RICHARD SNELLING, Governor, State of Vermont, and THOMAS EVSLIN, Secretary, Agency of Transportation, each individually and in their official capacities

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[Filed Feb. 21, 1986]

Appealed From Washington Superior Court
Docket No. S-217-81WnC

In the above entitled cause the Clerk will enter:

Reversed.

FOR THE COURT:

/s/ Louis P. Peck
LOUIS P. PECK
Associate Justice

Concurring:

/s/ Frederic W. Allen
FREDERIC W. ALLEN
Chief Justice

/s/ William C. Hill
WILLIAM C. HILL
Associate Justice

/s/ Ernest W. Gibson III
ERNEST W. GIBSON, III
Associate Justice

/s/ Thomas L. Hayes
THOMAS L. HAYES
Associate Justice

APPENDIX E

SUPREME COURT OF VERMONT

No. 82-021

AMERICAN TRUCKING ASSOCIATIONS, INC. and INTERNATIONAL TRANSPORT, INC., and G. H. HARNUM, INC., individually and on behalf of all others similarly situated

v.

WILLIAM CONWAY, PAUL PHILBROOK, RICHARD SNELLING, and THOMAS EVSLIN

Sept. 7, 1982

Before BARNEY, C.J., and BILLINGS, HILL, UNDERWOOD and PECK, JJ.

HILL, Justice.

This case presents a challenge to the constitutionality of various fees imposed on trucks from other states for entering Vermont. The trial court upheld the fees as constitutional. We vacate and remand for further factual findings.

The named plaintiffs, American Trucking Association[s] and two individual trucking firms, instituted this class action on behalf of all interstate motor carriers whose vehicles were primarily registered in states other than Vermont. The plaintiffs principally challenged a fee system imposed by the Vermont Legislature in 1981 on for-

eign registered trucks. The challenged provisions were adopted in the Act of May 13, 1981, No. 87, §§ 18-19a, 1981 Vt. Acts 329, 340-42 (codified at 23 V.S.A. §§ 415-419 (Cum.Supp.1982)) (hereinafter Act No. 87). Act No. 87 required operators of trucks with a gross weight of 18,000 pounds or more which were registered outside of Vermont to obtain a permit, costing $40, for each truck that would be owned or operated in Vermont. *Id.* at § 18 (codified at 23 V.S.A. § 415 (Cum.Supp.1982)). In addition, a fee was charged for each time a foreign registered truck entered the state. The entry fee was $15, with a surcharge of $10 if the foreign truck was registered in a state that imposed more than one tax on trucks using its highways. *Id.* at § 19 (codified at 23 V.S.A. § 417 (Cum.Supp.1982)). In lieu of these two charges, operators could purchase a single trip permit, which authorized a single entry into Vermont for a fee of $40. *Id.* at § 18a (codified at 23 V.S.A. § 415a (Cum. Supp.1982)). None of these fees were assessed against Vermont registered trucks.

A critical aspect of Act No. 87 was its repeal of 23 V.S.A. § 419 (1978), which permitted the Commissioner of Motor Vehicles to make reciprocal agreements with officials from other states waiving the imposition of the fees. Vermont had such agreements with thirteen states and the District of Columbia when Act No. 87 was enacted. The state cancelled all these agreements by June 15, 1981.

The plaintiffs also challenged the validity of the fee system in place before the passage of Act No. 87. That system required foreign registered trucks to pay an annual fee of $20 for a permit to travel on Vermont highways. 23 V.S.A. § 415 (1978). Truckers could elect to purchase a single trip permit for $20. 23 V.S.A. § 415a (1978). In addition, the state imposed a $10 fee for each entry into Vermont on trucks from states which

taxed Vermont trucks for using their highways. 23 V.S.A. § 417 (1978).

The plaintiffs requested declaratory, injunctive, and monetary relief. They claimed that the two fee systems violated the commerce clause of the United States Constitution, the supremacy clause of the United States Constitution, and the privileges and immunities clause of the United States Constitution. They also claimed that the tax schemes violated article nine of chapter one of the Vermont Constitution.

The trial court rejected the plaintiffs' claims. It held that the fee system survived constitutional scrutiny under both the state and federal constitutions. The plaintiffs appealed from that judgment.

During the pendency of this appeal, the Vermont Legislature again amended the fee system for foreign trucks. In the Act of April 20, 1982, No. 172, §§ 4-7a, 1981 Vt. Acts 188, 209-11 (Adj.Sess.) (codified at 23 V.S.A. §§ 415-423 (Cum.Supp.1982)) (hereinafter Act No. 172), the legislature imposed a uniform $50 fee on all trucks powered by nondiesel fuels. The fee applies to trucks registered in and outside of Vermont. *Id.* at § 4 (codified at 23 V.S.A. § 415 (Cum.Supp.1982)). In addition, Act No. 172 repealed Act No. 87's entry fee for each time a foreign truck entered Vermont, and substituted a "retaliatory" tax; if a foreign truck is registered in a state that imposes certain fees on Vermont trucks, that truck is required to pay a $10 fee each time it enters Vermont. *Id.* at § 19 (codified at 23 V.S.A. § 417(a) (Cum.Supp. 1982)). Act No. 172 also restored the Commissioner's power to make reciprocal agreements with other states to waive truckers' fees, and directs the Secretary of Transportation to negotiate with other New England states to establish a regional system for truckers' fees. *Id.* at §§ 7, 7a (codified at 23 V.S.A. §§ 419, 423 (Cum. Supp.1982)).

The validity of Act No. 172 has never been at issue in this case. Thus, the sole issue in this appeal is whether the plaintiffs are entitled to refunds for taxes collected under Act No. 87 and its predecessor system, on the ground that the taxes were unconstitutionally exacted.

The plaintiffs' most substantial claim[1] is under the commerce clause of the United States Constitution. To be upheld under that clause, Act No. 87 and its predecessor must survive the test of *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274, 97 S.Ct. 1076, 51 L.Ed.2d 326 (1977). There, the Supreme Court held that a tax on interstate commerce will be upheld if "the tax is applied to an activity with a substantial nexus with the taxing State, is fairly apportioned, does not discriminate against interstate commerce, and is fairly related to the services provided by the State." *Id.* at 279, 97 S.Ct. at 1079. The plaintiffs do not challenge Act No. 87 or its predecessor under the first two prongs of this test. They limit their attacks to claims that the fee system discriminated against interstate commerce and did not fairly relate to services provided by Vermont.

The trial court rejected the plaintiffs' assertion of discrimination on the grounds that (1) the fees collected from foreign trucks were not significantly disproportionate to those collected from Vermont trucks, and (2) the fees were not a discriminatory tax in addition to the foreign trucks' registration fees in their domiciliary states, because Vermont trucks could be subjected to such fees in other states. This form of analysis reflects the

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[1] The plaintiffs' claims under the fourteenth amendment and article nine of chapter one of the Vermont Constitution also rest on the asserted discriminatory impact of the taxes. Thus, the factual findings on the effect of the taxes are critical to these claims as well. We also postpone consideration of the plaintiffs' supremacy clause claim until we have the benefit of further findings on the discrimination issue.

practical approach endorsed by the Supreme Court in *Complete Auto Transit.* The indicia of constitutionality is the actual impact of a tax on interstate commerce. *Maryland v. Louisiana*, 451 U.S. 725, 756, 101 S.Ct. 2114, 2134, 68 L.Ed.2d 576 (1981). Nevertheless, while we concur in the methodology employed by the trial court, we conclude that the trial court did not make adequate findings to either support its judgment or enable us to properly review its decision.

The decisive issue in this case is whether Act No. 87 and its predecessor placed an unfair burden on interstate commerce. "All tax burdens do not impermissibly impede interstate commerce. The Commerce Clause balance tips against the tax only when it unfairly burdens commerce by exacting more than a just share from the interstate activity." *Department of Revenue v. Association of Washington Stevedoring Co.*, 435 U.S. 734, 748, 98 S.Ct. 1388, 1398, 55 L.Ed.2d 682 (1978). It has long been recognized that "interstate commerce must bear its fair share of the state tax burden." *Id.* at 750, 98 S.Ct. at 1399. The issue, then, is whether these schemes exacted unfair burdens, or simply assessed a fair share of the tax cost. Only a comparison of the costs imposed on foreign and domestic trucks in return for the services provided by Vermont sheds light on this inquiry.

The trial court's findings purport to make this comparison. Unfortunately, the findings are inadequate and contradictory. The court found that "certain foreign motor carriers would in fact save in their costs of operation if they were to register some or all of their motor vehicles in the State of Vermont." This, of course, is the essence of discrimination: the weight of the tax on the same truck is heavier if it is registered outside of Vermont. Yet, the trial court also found: "There is no evidence that the user fees paid . . . by foreign vehicles for use of Vermont highways are higher than such fees paid by Vermont registered vehicles through registration

fees and the vehicle purchase and use tax." The contradiction between these findings is inexplicable.

Moreover, the findings do not address critical evidence presented in the record. One of the named plaintiffs presented evidence showing that if all states imposed the fees mandated in Act No. 87, they would exceed its corporate earnings by tenfold. The trial court did not deal with this evidence. The court did make findings on the total costs and costs per mile of the named plaintiffs. There is, however, no comparison of the costs with those of Vermont truckers. On appeal, the plaintiffs argue that the costs imposed on Vermont trucks were substantially lower than those imposed on the foreign trucks. They base their argument upon raw data on Vermont truck usage, drawn from the record and multiplied by the statutory tax rates. If these data are accurate, the discrimination is manifest, severe, and unconstitutional. See *American Trucking Associations, Inc. v. Quinn*, 437 A.2d 623, 627 (Me. 1981). Without the benefit of findings on this point, however, we cannot say whether the actual impact of Act No. 87 and its predecessor on interstate commerce was discriminatory.

The trial court made findings concerning the proportion of the tax revenues contributed by foreign and Vermont trucks under the challenged fee system. The court also made findings concerning the proportionate numbers of foreign and domestic trucks using Vermont highways. These findings, however, tell us nothing about the critical facts, which are the number of miles travelled on Vermont highways by the two classes of trucks as compared to their respective tax burdens. As recently noted by the Maine Supreme Judicial Court, costs in the trucking industry are primarily calculated on a per-mile basis. See *id.* at 627 n.7. Only by comparing the cost per mile imposed by the fee systems on foreign as opposed to Vermont trucks can this Court assess whether the systems were actually discriminatory. The number

of foreign trucks using Vermont highways is irrelevant to this point.

Perhaps an even more telling flaw in the trial court's findings is the failure to distinguish the impact of the different tax schemes at issue. There are two systems, comprised of six separate levies, at issue in this case. The discriminatory impact of each of these levies may vary. Yet, the trial court's findings do not distinguish the impact of one system from the other. Nor do they separate the impact of the various levies within each system. These distinctions may amount to a world of constitutional difference. The impact of one levy within Act No. 87 may be constitutional while another levy is invalid. Simply because the plaintiffs have challenged all of these statutes en masse does not mean that the statutes may be judged en masse. The impact of the two systems, and the individual levies which comprise those systems, should be separately detailed in precise findings.

"Findings of fact made under V.R.C.P. 52 must state the facts essential to the disposition of the cause." *Van Velsor v. Dzewaltowski*, 136 Vt. 103, 106, 385 A.2d 1102, 1104 (1978). In this case, we are unable to determine from the findings whether the challenged statutes are unconstitutionally discriminatory. On remand, if the plaintiffs have failed to establish their burden of offering evidence on the facts necessary to their claims, findings to that effect would be appropriate. If, however, there is sufficient evidence in the record to make valid comparisons of the actual costs imposed by the separate levies of tax schemes on foreign and Vermont trucks, findings on these points must be made.

Judgment vacated. Cause remanded for further factual findings.

APPENDIX F

STATE OF VERMONT)
WASHINGTON COUNTY, SS.)

WASHINGTON SUPERIOR COURT

Docket No. S185-82 WnC

AMERICAN TRUCKING ASSOCIATION[S], *et al.*

vs.

WILLIAM CONWAY, VERMONT COMMISSIONER OF MOTOR VEHICLES, *et al.*

OPINION AND ORDER

Plaintiffs have moved, pursuant to Rule 59(e), V.R.C.P., to alter the judgment order dated August 31, 1983 to include an order requiring the State to pay the Plaintiffs and the class they represent any fees, fines or penalties collected pursuant to the Diesel Fuel Tax Act (23 V.S.A. § 3007, 415, and 3010). By stipulation dated October 7, 1982, the parties agreed as follows:

> That in the event the Act is finally declared to be unconstitutional and void in whole or in part, by Order of a Vermont Superior Court or any higher court having competent appeals jurisdiction thereof, any fees and penalties wrongfully or illegally obtained by the State of Vermont and its instrumentalities and ordered to be repaid thereby may be refunded pursuant to 23 V.S.A. 3020. . . , 23 V.S.A. 328 or in any other manner ordered by such Court.

This action was commenced pursuant to this Court's jurisdiction to issue declaratory judgments, 12 V.S.A.

§ 4711, *et seq.*, *Neal v. Brockway*, 136 Vt. 119 (1978), and afford relief in cases involving substantial constitutional issues and threatened irreparable harm, *Auclair v. Vermont Electric Power Co.*, 133 Vt. 22, 24 (1974). Consequently, our jurisdictional power at this stage of the litigation is confined to declaring the rights of the parties and ordering prospective relief. We have determined that a declaratory judgment is sufficient without the need for injunctive relief.

Despite the stipulation recited above, this is a case where an award of a monetary judgment is barred by the doctrine of sovereign immunity of the type found in *Stoneman v. Vergennes School Dist. #5*, 139 Vt. 50, 54-55 (1980). *Accord, Edelman* v. *Jordan*, 415 U.S. 651 (1974) (collection of welfare benefits wrongfully withheld barred by sovereign immunity though prospective relief permitted).[1]

We recognize that the statute authorizes the Washington Superior Court to conduct a *de novo* review *"after* any decision, order or findings of the Commissioner of Motor Vehicles . . . ." 23 V.S.A. § 3023 (emphasis supplied).[2] Arguably, our powers of *de novo* review would permit us to determine whether taxes should be refunded. However, there has been no decision on the Commissioner's part in this case.

Since this case was not one pursuant to the Court's appellate jurisdiction conferred by 23 V.S.R. § 3023, Plaintiff's motion must be and is DENIED.

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[1] The issue of sovereign immunity involves the Court's jurisdiction over the subject matter and, as such, may be raised at any point in the proceedings. *Berry v. Arnoldware-Rogers, Inc.*, 127 Vt. 188, 192, 243 A.2d 781 (1968); cf. 5 Wright & Miller, *Federal Practice and Procedure* § 1212.

[2] Section 3020(b) permits the Commissioner of Motor Vehicles to refund a tax, penalty, interest or fee required by the Act which "has been illegally . . . collected."

Dated at Montpelier, County of Washington, and State of Vermont, this 7th day of December, 1983.

/s/ James L. Morse
JAMES L. MORSE
Superior Judge

/s/ Willis C. Bragg
WILLIS C. BRAGG
Assistant Judge

APPENDIX G

STATE OF VERMONT)
) ss.
WASHINGTON COUNTY)

WASHINGTON SUPERIOR COURT

Docket No. S185-82WnC

AMERICAN TRUCKING ASSOCIATIONS, INC., and CHEMICAL LEAMAN TANK LINE[S], INCORPORATED and ANDERSON TRUCKING SERVICE, Individually and on behalf of all others similarly situated

vs.

WILLIAM CONWAY, VERMONT COMMISSIONER OF MOTOR VEHICLES, PAUL PHILBROOK, VERMONT COMMISSIONER OF PUBLIC SAFETY, RICHARD SNELLING, GOVERNOR OF THE STATE OF VERMONT, and PATRICK J. GARAHAN, SECRETARY OF THE VERMONT AGENCY OF TRANSPORTATION

OPINION AND ORDER

This is a challenge to the constitutionality of the diesel fuel, and non-diesel fuel user and trip licenses required on an annual basis for all motor trucks weighing over 18,000 pounds. The parties have submitted the case for decision on the merits on the basis of the following stipulated facts:

1. Plaintiff American Trucking Associations, Inc., ("ATA") is a national non-profit corporation organized and operating under the non-profit corporation laws of the District of Columbia and with its principal place of business located there. ATA is a federation of 51 state

trucking associations (including the District of Columbia) and 13 national conferences. It represents every type and geographical scope of motor carrier operation in the United States, including over 10,000 for-hire carriers, and tens of thousand of private and local carriers. Approximately 5,000 non-Vermont based motor carrier companies, operating a total of approximately 50,000 individual motor carrier vehicles, are subject to and will be affected by the fee requirements and penalty provisions imposed by No. 172 of the Acts of the 1982 (1981 Adjourned) Session of the Vermont Legislature, upon and after the effective date of said Act, assuming their use of Vermont highways.

2. Plaintiff, Chemical Leaman Tank Line Incorporated (Chemical Leaman) is a Delaware corporation with its principal place of business in Lyonville, Pennsylvania. It is an interstate motor carrier as defined in the Interstate Commerce Act. Chemical Leaman operates 1691 tractors and trucks over 18,000 pounds each that are subject to the fee and penalty provisions set forth in the statutes complained of herein. Chemical Leaman is in full compliance with all requirements for highway taxes and fees as currently imposed by the State of Vermont.

3. Plaintiff, Anderson Trucking Service, Inc. (Anderson) is a Minnesota corporation with a principal place of business in St. Cloud, Minnesota. It is an interstate motor carrier as defined in the Interstate Commerce Act. Anderson operates 480 tractors over 18,000 pounds each that are subject to the fee and penalty provisions of the statutes complained of herein. Anderson is in full compliance with all requirements for highway taxes and fees as currently imposed by the State of Vermont.

4. Defendant William H. Conway (Conway) is the Commissioner of Motor Vehicles of the State of Vermont. Pursuant to state law, Defendant Conway is charged with responsibility for:

(a) acceptance of applications, collection of fees and issuance of licenses pursuant to Act No. 172 as hereinabove described;

(b) suspension or revocation of licenses pursuant to Act No. 172 as hereinabove described;

(c) acceptance of additional fees and penalties pursuant to Act No. 172 as hereinabove described, and

(d) the enforcement of appropriate penalty provisions contained in Act No. 172 as hereinabove described.

5. Defendant Richard Snelling, is the Governor of the State of Vermont and is the chief executive and law enforcement officer of the state. Among the statutes under which the defendant Snelling exercises authority is Title 23, Motor Vehicles, of Vermont Statutes Annotated, including the provisions of that Title as set forth in Act No. 172 as hereinabove described.

6. Defendant Paul Philbrook, is the Commissioner of Public Safety and as such is the chief enforcement officer save for the Governor, of all the statutes, rules and regulations pertaining to the laws of the road and is required by law to cooperate with the Vermont Commissioner of Motor Vehicles in carrying out all statutes, rules and regulations relating to the operation of motor vehicles in the State of Vermont.

7. Defendant Patrick J. Garahan, is the Secretary of the Vermont Agency of Transportation and as such is responsible pursuant to Chapter 55 of Title 3 V.S.A. for the planning, coordination and direction of the functions of the said agency, which includes under its aegis the Vermont Motor Vehicle Department.

8. Plaintiff ATA obtained from the Vermont Department of Motor Vehicles a listing of foreign based motor carriers who held Vermont annual highways use permits from the Department as of June 30, 1982. ATA also ob-

tained a listing of Vermont based motor carriers who had registered their vehicles in the State of Vermont as of June 30, 1982. A survey was conducted in July and August of 1982 by ATA based upon that information amongst all motor carriers so listed. Survey questionnaires were sent to 7,753 foreign based carriers. One hundred fifty-five (155) of those survey questionnaires were returned addressee unknown. There were 1,200 duplicate questionnaires sent out. Approximately 6,370 carriers were actually contacted. From the group, 1,247 survey responses were received.

Questionnaires were also mailed by ATA to 5,970 Vermont based carriers. Twenty-two (22) of the questionnaires were returned addressee unknown with questionnaires being received by 5,948 carriers. There were 237 responses to the survey from Vermont based motor carriers involved in interstate commerce. Two hundred forty-eight (248) motor carriers responded whose trucks were used exclusively in intra-state service within Vermont.

9. Fuel, as defined in Chapter 27 of Title 23 V.S.A. as added by Act No. 172 is diesel fuel or a blend thereof.

10. Pursuant to Act No. 172, users of fuel, such as the plaintiff class, are required to pay a tax burden on the amount of motor fuel used within Vermont. The Act provides a credit mechanism to insure that a motor carrier is not charged the same tax by two different states.

11. Members of the plaintiff class, as well as any others who operate motor trucks of over 18,000 pounds using gasoline and other non-diesel fuels pay a tax assessed upon any such fuel purchased in Vermont pursuant to Act No. 172.

12. But for the exceptions set forth in 23 V.S.A. 3007 and 415(a), all members of the plaintiff class, as well as all other persons, are required pursuant to Act. No. 172 to purchase either "diesel fuel user licenses" (23 V.S.A. 3007) or "non-diesel fuel user licenses" (23 V.S.A.

415(a) as amended) on an annual basis for all motor trucks of over 18,000 pounds operated by them within Vermont at an annual license fee per truck of $50.00.

13. As an alternative to and in lieu of the license fees required by 23 V.S.A. 3007 and 415(a), members of the plaintiff class are permitted to purchase trip permits, each such permit authorizing one trip into Vermont pursuant to 23 V.S.A. 3010 and 415(c) respectively, at a cost of $50.00 per trip.

14. The diesel fuel tax is levied on users of fuel within the state and expressly limits the tax to fuel actually consumed within the state. A proration scheme is included within the statute.

15. But for the exceptions set forth therein 23 V.S.A. 3007 provides, inter alia, that in addition to any other motor vehicle fees, all owners and operators of any motor truck over 18,000 pounds in gross weight which uses fuel as above defined must pay a $50.00 annual license fee for each such motor truck operating upon the highways of Vermont.

16. 23 V.S.A. 367(a), as amended by said Act No. 172, sets forth the annual fees for registration of motor trucks and provides, inter alia, that the annual registration fee for motor trucks with a gross weight of 18,000 pounds or over shall be $50.00 less than the fee computed in accordance with that said statute.

17. 23 V.S.A. 3009 provides, inter alia, that the Commissioner of Motor Vehicles may suspend or revoke the fuel user's license of any person who fails to comply with any provision of the Chapter or any rule adopted pursuant thereto.

18. 23 V.S.A. 3010 provides, inter alia, that in lieu of paying the fee required by 3007 and paying a tax based on fuel usage in Vermont as required by 3014, an unlicensed user may pay a $50.00 single trip permit fee,

which permits one motor truck to operate in Vermont for a single trip not to exceed seven consecutive days.

19. 23 V.S.A. 3022 provides, inter alia, for the collection by the Commissioner of Motor Vehicles of the fees hereinbefore described, and in some instances, for the use of warrants therefore.

20. 23 V.S.A. 3024 provides, inter alia, that any person who willfully fails to comply with the provisions of Chapter 27 of said Title 23, shall be, in addition to any other penalties herein or elsewhere prescribed, guilty of a misdemeanor punishable by a fine of not more than $5,000.00 or imprisonment for not more than one year or both. In addition, it allows the imposition of up to a $2,000.00 fine upon a person who operates a motor vehicle in Vermont without obtaining the diesel fuel user's license and marker required in Section 3007.

27. 23 V.S.A. 415, as amended by Act. No. 172 aforesaid, provides inter alia, that in addition to any other provisions of law relating to registration of motor trucks with a gross weight of 18,000 pounds or over and powered by a gasoline or any other non-diesel fuel, a person operating or owning a motor truck upon Vermont highways shall apply for a non-diesel fuel user's license and pay a fee of $50.00 for each such motor truck.

22. 23 V.S.A. 423 requires, inter alia, defendant Secretary of Transportation to negotiate for a compact or agreement with the other New England states which would require that the annual user license fee for each state should be $50.00 as provided by this Chapter for Vermont. To date, such compact has not been negotiated with authorized officials of the other New England States.

23. 23 V.S.A. 421(a), as amended by Act No. 172, provides, inter alia, that it is unlawful for any person to operate a motor truck without obtaining the permit required by 23 V.S.A. 415 or to violate any regulation issued by the Commissioner under the Chapter.

24. 23 V.S.A. 2201 provides, inter alia, that a traffic offense is defined, as amongst other things, a violation of diesel fuel user's licenses, non-diesel fuel user's licenses, or failure to maintain a log.

25. 23 V.S.A. 367 provides, as amended, and, provided prior to amendment, inter alia, a schedule for payment of annual registration fees by owners and operators for motor trucks operating on Vermont highways. 23 V.S.A. 411 provides, inter alia, that all foreign motor trucks which have complied with the registration fees imposed by their own jurisdiction shall be exempt from the payments called for under 23 V.S.A. 367, where such jurisdiction affords the same reciprocity to Vermont domiciliaries. Virtually all jurisdictions in the United States have similar reciprocity and registration provisions. Thus, virtually all motor trucks pass freely, as far as compliances with registration requirements are concerned, in interstate commerce throughout the nation if they have complied with the registration requirements of their own state of domicile.

26. The $50.00 motor fuel license fee imposed by 23 V.S.A. 3007 and 415(a) is a part of the motor fuel taxes imposed to create revenues for the state highway fund.

27. Vermont registered vehicles must obtain the same $50.00 diesel fuel user's license and non-diesel fuel user's license as foreign registered vehicles are required to obtain.

28. If a Vermont registered vehicle and a foreign based vehicle travelled the same number of miles in Vermont in a given year, the cost per mile during that year due to the $50.00 motor fuel license imposed by 23 V.S.A. 3007 and 415(a) for each of the two vehicles would be identical.

29. Vermont registered vehicles are unable to purchase the single-trip license authorized by 23 V.S.A. 3010 and 415(c).

30. By virtue of the nature of their operations, Chemical Leaman and Anderson, as well as the members of the class they represent, find predetermination as to which of their several vehicles will enter Vermont, and how many times, in a given year, is totally impossible and is subject to the vagaries of demand, routing and other factors. Likewise it is impossible to predetermine the number of miles a motor truck will be operating in Vermont either on a given trip or annually. However, the operations of such motor carriers when examined on a fleet basis, provide accurate average figures for the number of trucks to be qualified for use within the State of Vermont and the number of miles traveled to Vermont by each such carrier on an annual basis.

31. During the most recent annual period for which statistics are available (July 1, 1981 through June 30, 1982), plaintiff Chemical Leaman secured and displayed Vermont annual permits on 248 of its motor carrier vehicles which operated:

a. 8,170,361 miles everywhere, and

b. 54,041 miles within Vermont.

32. If each of plaintiff Chemical Leaman's 248 motor carrier vehicles was qualified to operated in Vermont at an annual cost of $50.00 each, as called for under Act No. 172, that would represent a total annual cost to the plaintiff of $12,400.00.

33. Based upon such projections, the average cost of the fuel licenses per mile traveled in Vermont to plaintiff Chemical Leaman would be 22.95 cents.

34. During the most recent annual period for which statistics are available (July 1, 1981 through June 30, 1982), plaintiff Anderson secured and displayed annual permits on 184 of its motor carrier vehicles which operated:

a. 3,209,741 miles everywhere, and

b. 80,873 miles within Vermont.

35. If each of plaintiff Anderson's 184 motor carriers vehicles was qualified to operate in Vermont at an annual cost of $50.00 each as called for pursuant to Act No. 172, that would represent a total annual cost to the plaintiff of $9,200.00.

36. The average cost of such fuel licenses per mile traveled in Vermont to plaintiff Anderson would be 11.38 cents.

37. The per mile costs set forth in this Stipulation are based upon the information obtained by ATA through its survey of Vermont and foreign based motor trucks as aforesaid. Based upon the data obtained for the year July 1, 1981 through June 30, 1982, contained in the questionnaires distributed by ATA and returned to it as described in a paragraph 8 hereof, costs per mile for foreign and Vermont based motor trucks have been calculated pursuant to the fee requirements of No. 172 of the Acts of the 1982 (1981 Adjourned) Session of the Vermont Legislature to provide the Court with a statistical basis upon which to consider the effects of that Act.

38. Based upon a sample of 1,247 interstate motor carriers operating 23,873 vehicles in Vermont for the year, July 1, 1981 through June 30, 1982, the average cost per mile of compliance with the Vermont annual permit was 6.53 cents for motor carriers with motor carrier vehicles based in jurisdictions other than Vermont. This cost calculation is based upon a total Vermont annual plate cost and trip permit cost to these motor carriers of $1,193,650 divided by a total of 18,890,483 miles operated by the carriers' motor carrier vehicles within Vermont. The total miles operated by these carriers everywhere was 6,760,855,458 with the result that 0.28 percent of their total miles were operated in the State. See Attachment 1.

39. Based upon a sample of 237 interstate carriers for the year July 1, 1981 through June 30, 1982, the average

cost per mile of compliance with the Vermont fuel license would be 0.29 cents for motor carriers having interstate motor carrier vehicles registered in Vermont. This cost calculation is based upon a cost to the carriers of $34,050 divided by a total of 11,640,139 miles operated by the carriers in Vermont. The total miles operated by these carriers everywhere was 29,689,431, with the result that 39.20 percent of their total miles were operated in Vermont. See Attachment 2.

40. In addition to the survey replies received from the 237 motor carriers operating 681 interstate motor carrier vehicles registered in Vermont, the survey resulted in an additional responses from 248 motor carriers operating 363 motor carrier vehicles registered in Vermont. The vehicles of these carriers, however, were used exclusively in intrastate service within Vermont.

41. Based upon their experience in the year July 1, 1981 through June 30, 1982 the following motor carriers operating motor carrier vehicles based in Vermont would experience costs per mile of 0.50 cents or greater in complying with the fuel license requirements:

Registrant/Owner	Fuel License	Cost Per Mile
Henry James Bell	$50	$1.0000
Page, Gerald R.	$50	$0.5000
Martell, Louis E.	$50	$0.5000

42. Based upon their experience in the year-July 1, 1981 through June 30, 1982, the following motor carriers operating motor carrier vehicles based in states other than Vermont would experience costs per mile of fifty (50) cents or greater in complying with the Vermont fuel license or trip permit requirements:

Registrant/Owner	Fuel License Cost	Cost Per Mile
Southern Tier Hide Tallow	$300	$42.8571
Sammons Trucking	$1,850	$32.4561
Cardinal Transport Inc.	$8,300	$12.8482

Registrant/Owner	Fuel License Cost	Cost Per Mile
Delivery Service Corp.	$2,400	$10.6194
Dalec Enterprises	$100	$8.3333
Trend Line Furniture	$1,150	$7.9861
Anderson Peat Organic Com.	$100	$7.6923
Ashford Concrete Inc.	$100	$7.6923
Cushing, Larry	$350	$7.0000
Distribution SVC SYS Inc.	$10,700	$6.8326
Graphite Products	$150	$6.2500
Jarvie Mel Const Co Inc.	$1,100	$5.4187
Aubrey, Jay	$100	$5.0000
Chester Hide Skin Corp.	$200	$5.0000
Ryan E T Iron Works Inc.	$100	$5.0000
Sullivan Joseph P Co.	$50	$5.0000
Thruway Transfer Inc.	$250	$5.0000
Whittle Riley Inc.	$2,150	$4.1346
Green Field Transport Co.	$2,400	$3,9603
Burnham Van Service Inc.	$17,050	$3.9186
Werner R D Co Inc.	$850	$3.8812
Bama Transport Co.	$3,100	$3.8130
Carpet Center Lease Co Inc.	$400	$3.7735
Derosier Storage Co.	$100	$3.5714
Mix, James	$100	$3.3333
Bay State Lobster	$600	$2.8846
Stearlys Motor Freight	$600	$2.4691
Fitch Electronics	$100	$2.3809
Steel Transportation Co.	$100	$2.2727
A A Transport Inc.	$1,800	$2.2670
Murray Envelope Corp.	$400	$2.1978
Bird Trucking Inc.	$13,900	$2.1858
Colorado Kenworth Inc.	$650	$2.1594
Brookville Transport Ltd.	$300	$2.1428
Lakeshore Produce Limited	$150	$2.1126
Rollings Leasing Corp.	$72,300	$2.1051
Global Van Lines Inc.	$16,850	$2.0194
Bakelite Thermosets Ltd.	$200	$2.0000
South Hills Movers Inc.	$100	$2.0000
Springer Barry N Inc.	$100	$2.0000

Registrant/Owner	Fuel License Cost	Cost Per Mile
Hitchcock Bros Inc.	$50	$2.0000
Callahan Bros Inc.	$350	$1.9553
Beechler, Wm.	$50	$1.8518
Treadwell, Hollis	$100	$1.8518
Allens Transfer Storage	$500	$1.8181
Norfolk Rendering Wks.	$750	$1.7857
Interstate Van Lines	$3,500	$1.7721
Trans East Inc.	$500	$1.7482
Longmont Transport Co Inc.	$1,100	$1.7460
Geauga Truck Lines Inc.	$350	$1.6279
Wyman, Jasper C	$50	$1.6129
Steven Mark Inc	$850	$1.6037
Mich Tube Swagers Fab Inc.	$100	$1.5625
American Electric Corp.	$500	$1.5479
Sunflower Carriers	$1,250	$1.5470
Rainbow Exp Siv RW System	$100	$1.5384
Palmer Trucking Co Inc.	$150	$1.5000
Murphy E L Trk	$1,750	$1.4668
Tuscan Dairy Farms	$300	$1.4354
Best Pak Inc.	$50	$1.4285
Semes Motor Lines Inc.	$400	$1.4285
Depriest, Junior	$400	$1.3333
Reichhold Chemicals Inc.	$200	$1.3333
Hester Industries Inc.	$750	$1.3321
Andrew Van Lines	$1,200	$1.3274
Lott Motor Lines Inc.	$2,200	$1.3157
Moroney Body Works	$100	$1.3157
M K Trucking Inc.	$850	$1.2996
Bancroft Martin Inc.	$450	$1.2605
Days Pat Trailers	$100	$1.2500
F G R R Trucking Co.	$150	$1.2500
Sloat Farms Transport	$50	$1.2500
Taillon Crane Service	$250	$1.2500
J L T Inc.	$700	$1.2389
Coble Systems Inc.	$14,850	$1.2375

Registrant/Owner	Fuel License Cost	Cost Per Mile
Hartman H A Son Inc.	$100	$1.1904
Forney Ray J Inc	$100	$1.1764
D A D Transportation	$200	$1.1428
Midwest Refrg Exp Inc.	$5,700	$1.1425
Everette Truck Line Inc.	$600	$1.1363
UDS Truck Lease Inc.	$550	$1.1000
Schedules Truckway	$100	$1.0989
Schilli Motor Lines	$1,300	$1.0989
Butler Ventamatic Corp.	$150	$1.0869
Moran Crowley Environment	$300	$1.0869
Anty Trucking	$450	$1.0714
Neptune World Wide	$850	$1.0664
Harrington Richardson Inc.	$1,050	$1,0584
Treen, Fred G	$50	$1.0416
Fiamingo Moving & Storage Inc.	$50	$1.0416
Amusements of America	$2,000	$1.0288
MDR Cartage Inc.	$1,000	$1.0232
B Motor Freight	$100	$1.0000
Box Mountain Quarries	$50	$1.0000
Colonial Trucking Inc.	$200	$1.0000
Deane, Chaarles R	$50	$1.0000
Flynn, Daniel L	$50	$1.0000
Stgermain Transport Ltee	$600	$1.0000
Yonder Fruit Farms	$100	$1.0000
Pelletier E J Son	$150	$0.9375
Rynone Industries Inc.	$700	$0.9370
J B Hunt Transport Inc.	$6,000	$0.9175
Miller Auto Leasing	$50	$0.9090
Howard Indust Inc.	$900	$0.8849
Pirozzi, John V	$100	$0.8771
Stuart Transportation Co.	$2,850	$0.8731
Olson Fred Co Inc.	$150	$0.8670
National Car Rent Sys. Inc.	$23,350	$0.8579
Everett Piano Co.	$300	$0.8571
White Tiger Trans Inc.	$700	$0.8464

Registrant/Owner	Fuel License Cost	Cost Per Mile
Helman E Co Inc.	$350	$0.8454
Crete Carrier Corp.	$1,050	$0.8433
Arrowhead Mills Inc.	$100	$0.8333
Goodnow R H Const.	$50	$0.8333
H H Industrial Service	$50	$0.8333
Decarolis Truck Rental	$900	$0.8196
Johnson Acoustics Inc.	$100	$0.8196
Winegard Co.	$350	$0.8027
Central Trans	$900	$0.7971
Kivort Steel Inc.	$100	$0.7874
Crandall, Patrick	$50	$0.7812
Hartmans Inc.	$2,200	$0.7578
Word of Life Fellowship	$50	$0.7575
Heding Truck Service	$900	$0.7556
Standard Roofings Inc.	$150	$0.7500
Patrick Ind Inc.	$100	$0.7462
Seaboard Tank Line Inc.	$200	$0.7407
Gibbons John Inc.	$50	$0.7246
Cushman Rentals Limited	$950	$0.7142
Dutch Gold Honey Inc.	$100	$0.7142
Empire Silo Inc.	$50	$0.7142
Fairview Inc.	$300	$0.7058
Steven Freight Service Co.	$350	$0.7000
Getz William Z Inc.	$2,650	$0.6794
Hulcher Emergency Service Inc.	$600	$0.6703
Brown, Gordon R	$100	$0.6666
Ryback, John	$6100	$0.6666
Tenney, Harold S.	$50	$0.6666
Simco Heating Fuel Co Inc.	$100	$0.6666
Maddens Transfer Stge Inc.	$400	$0.6611
Fiberdome Inc.	$50	$0.6578
Findlay Truck Line Inc.	$100	$0.6578
Con Mac Trucking	$200	$0.6430
Carter Van Lines	$200	$0.6349
Colonial Rubber Works Inc.	$1,400	$0.6300

Registrant/Owner	Fuel License Cost	Cost Per Mile
A A Leasing	$100	$0.6250
Kelts, Phyllis	$50	$0.6172
J J Log Lumber Corp.	$300	$0.6097
Hertz Penske TK LSG	$85,000	$0.6024
Central Transport	$750	$0.6004
Howard Bown Corp.	$250	$0.5980
Scheib Floyd A Inc.	$200	$0.5934
Wilco Truck Rental Inc.	$6,900	$0.5934
Tallman Transport Inc.	$150	$0.5882
Carrier Transport Service	$100	$0.5847
Stanford Seed Co. Inc.	$350	$0.5833
Rounds, Ralph	$50	$0.5813
Leaseway Trans Leas Corp.	$5,750	$0.5764
All Corp.	$50	$0.5747
Taillon, Daniel	$100	$0.5714
E C Trkg	$50	$0.5681
Harrison Oil Corp.	$100	$0.5649
Caldeonia Lines Inc.	$300	$0.5555
Eastman, Roger H	$50	$0.5555
Durocher, Sylvain	$550	$0.5500
Roll On Inc.	$400	$0.5486
Kuhn Transportation Co.	$600	$0.5454
Weaver Nelson SDN Inc.	$50	$0.5434
Boyle Brothers Inc.	$250	$0.5422
Dana Trucking Co.	$250	$0.5411
Illinoise CA Express	$50	$0.5376
Lasalle Deitch Co Inc.	$200	$0.5376
Henry E E Inc.	$100	$0.5347
Reed, Deforest L	$200	$0.5347
Metals Engineering Corp.	$150	$0.5281
Miller Ceramics Inc.	$100	$0.5263
Schoch J Son	$50	$0.5263
Parlee Lumber Box Co Inc.	$100	$0.5208
Butler Trucking	$50	$0.5203
Chem Haulers Inc.	$600	$0.5194

Registrant/Owner	Fuel License Cost	Cost Per Mile
Transpo Intl Inc.	$400	$0.5188
B Right-Trucking	$150	$0.5136
Fenoff Construction	$50	$0.5102
Kilpatrick, Millard	$50	$0.5102
Sined Leas Inc.	$50	$0.5102
Stallman M H Co Inc.	$700	$0.5046
Allied Container Corp.	$200	$0.5000
Barrieau Express Inc.	$500	$0.5000
Bement, Oak L.	$50	$0.5000
Chapel Hill Fruit Distrib.	$50	$0.5000
Johnson Thomas Forest Pro.	$200	$0.5000
G. Carriers Inc.	$100	$0.5000
Saltmarsh, F W	$50	$0.5000
Viking Corrugated	$50	$0.5000
Wachusett Tea Co.	$300	$0.5000
Woburn Machine Co.	$50	$0.5000
Mariano Brothers Inc.	$200	$0.5000

43. The average motor carrier vehicle operating at 80,000 pounds gross vehicle weight experiences fuel consumption at 4.9 miles per gallon. The average motor carrier vehicles operating at 60,000 pounds gross vehicle weight experiences fuel consumption of 5.3 miles per gallon. The average motor carrier vehicle operating at 40,000 pounds gross vehicle weight experiences fuel consumption of 5.9 miles per gallon. The average motor carrier vehicle operating at 20,000 pounds gross vehicle weight experiences fuel consumption of 6.6 miles per gallon.

44. The chart annexed hereto as Attachment 3 summarized and compares the cost per mile of compliance with the Vermont fuel license and trip permit requirements for motor carriers with Vermont-based motor carrier vehicles and motor carriers with non-Vermont-based motor carrier vehicles based upon the aforementioned ATA surveys.

45. When motor carrier vehicles based in jurisdictions other than Vermont travel to Vermont, these vehicles travel an average of 116 miles over Vermont's highways per entry into the state.

46. In order to accommodate infrequent trips to Vermont by motor carrier vehicles based in jurisdictions other than Vermont, Vermont allows compliance with their laws by the display of a trip permit valid for seven days in lieu of any fuel tax and fuel user license. [23 V.S.A. 3010 and 415(c)] Prior to June 1981 each trip permit cost $20 and was in lieu of the highway use permit. Subsequent to June, 1981 and prior to the present legislation becoming effective, each trip permit cost $40 and was issued in lieu of the highway use permit and the entry fee. Subsequent to enactment of the present legislation each trip permit cost $50 and was in lieu of the fuel user license and fuel tax and the reporting requirements of 23 V.S.A. Chapters 7 and 27.

47. Although trip permits may be secured by mail from the Commissioner of Motor Vehicles, less than 1 percent of the trip permits issued are secured in this fashion because motor carriers: a) do not have adequate advance notice of the need for a trip permit to allow them to order permits in advance; and b) even where they do have such advance notice, the carrier most commonly does not have advance knowledge of which vehicle will be dispatched for the designated movement.

48. Over 99 percent of the trip permits used by motor carriers are secured through one of the several permit services which the Commissioner of Motor Vehicles allows to transmit trip permits. The permit services: a) accept orders for trip permits by telephone; b) issue the trip permit to the motor carrier; and c) transmit the permit by wire to any one of thousands of locations throughout the United States designated by the ordering motor carrier. These locations include: 1) permit service offices:

2) carrier offices or terminals; and 3) truck stops. The permit service pays the Commissioner of Motor Vehicles the required $50 fee for each permit it issues.

49. Although Vermont realized $50.00 in revenue for each trip permit issued, the motor carrier experiences a total cost which ranges from $56.50 to $63.00 per trip permit. This cost includes the permit fee and the permit service fee. The total permit cost is dependent upon the selection of the permit service, the location to which the permit is to be transmitted and the gross volume of business tendered by the motor carrier to the

50. The $50.00 annual vehicle fuel license fee is not intended solely as a means to defray the cost of administering the Non-diesel Fuel User's license tax and the Diesel Fuel Tax.

51. The $50.00 annual vehicle fuel license fee under Chapter 7 and Chapter 27 of Title 23 is a revenue raising tax imposed upon users of Vermont highways.

52. Attachment 4 is a tabulation of the fuel reporting laws of all fifty states and the District of Columbia with respect to annual vehicle permit fees.

53. The 1981 annual cost for state fuel tax permits assessed against Plaintiff Chemical Leaman in the forty-eight continental United States was approximately $164,976.00. If each such state were to assess annual fees equal to the $50.00 cost of the Vermont fuel license, the annual cost to Chemical Leaman for such state fuel tax permits would increase by approximately $1,462,235.00. Chemical Leaman's pretax net income for 1981 was $264,000.00.

54. The 1981 annual cost for state fuel tax permits assessed against Plaintiff Anderson Trucking in the forty-eight continental United States was approximately $74,775.75. If each such state were to assess annual fees equal to the $50.00 of the Vermont fuel license, the

annual cost to Anderson Trucking or state fuel tax permits would increase by approximately $870,274.00. Anderson Trucking's pretax net income for 1981 was $2,531,726.00.

55. The $50.00 diesel fuel and non-diesel fuel user's license fee is not related or intended to be related in any way to actual mileage travelled in the State of Vermont by the vehicle paying the fee.

56. Burnham Van Service, Inc. (Burnham) is a corporation organized under the laws of the state of Georgia with its principal place of business located at Columbus, Georgia. Burnham is principally engaged in the movement of household goods in interstate commerce as a common carrier certificated by the Interstate Commerce Commission at MC-682. Burnham provides their transportation services for customers between all points in the contiguous 48 states utilizing its own 21 terminals located in 12 states and the facilities of over 200 independent agents at locations throughout the 48 contiguous states.

57. During the period July 1, 1981 through June 30, 1982, Burnham secured 339 annual Vermont permits and 2 Vermont trip permits which, at the current cost of $50 each, represents an annual expense of $17,050 to qualify its vehicle to provide service for those moving their household goods to, from or through Vermont. During this period Burnham vehicles operated 14,310,647 miles everywhere and only 4,351 miles in Vermont. Based upon this previous experience, the Vermont fuel license expenses would represent a cost to Burnham of $3.9186 per mile for Vermont operations. Under the old system of $40.00 the per mile cost would have been $3.14.

58. Rollins Leasing Corporation (Rollins) is a corporation organized under the laws of the State of Delaware with its principal place of business in Wilmington, Delaware. Rollins is principally engaged in the leasing

and renting of trucks on both a long term and short term basis from 121 leasing and rental offices located in 32 states. Rollins' lessees operate Rollins trucks throughout the United States.

59. In order to assure that trucks are qualified to operate as required by Rollins' customers, Rollins qualifies their vehicles in almost all states. Leased vehicles are qualified to operate in the state designated by individual long term lessees. Rental vehicles, however, must be qualified to operate on a short term rental basis in a broad variety of states in order to assure Rollins ability to meet the needs of their rental customers and avoid both the expense of penalty impositions and customer embarrassment.

60. During the period July 1, 1981 through June 30, 1982 Rollins secured 1,421 annual Vermont permits and an additional 25 trip permits for their vehicles in order for those vehicles to be lawfully qualified for use in Vermont. The vehicles operated 279,592,180 miles everywhere and only 34,345 miles in Vermont during the same period. The aggregate cost of these permits at the current unit cost of $50 would be $72,300. On a mileage basis this fuel license expense would represent a cost of $2.1051 per mile. Under the old system of $40.00 the per mile cost would have been $1.68.

61. Southern Tier Hide and Tallow, Inc. (Southern Tier) is a corporation organized under the laws of New York State with its principal place of business in Elmira, New York. Southern Tier is principally engaged in the business of curing animal hides for sale to tanneries in the further manufacture of leather and leather products. Southern Tier makes delivery of their cured hides to tanneries by use of their fleet of private trucks to points in 14 states and the Canadian provinces of Ontario and Quebec.

62. During the period July 1, 1981 through June 30, 1982 the Southern Tier fleet of 6 trucks operated 328,805

miles everywhere and only 7 miles within Vermont. Southern Tier must, to satisfy its customer's demands, qualify its entire fleet in Vermont to assure the availability of its vehicles to deliver cured hides to its customer Pownal Tanning Company. The Southern Tier fleet qualification in Vermont cost $300 at the current cost of $50 each which would represent a cost of $42.8571 per mile of Vermont operations based on its prior experience. Under the old system of $40.00 the per mile cost would have been $34.28.

63. Century Manufacturing Company is a corporation organized under the laws of Minnesota with its principal place of business in Minneapolis, Minnesota. Century operates as a major manufacturer of electric arc-welders and electric battery chargers sold and serviced for customers located in all 50 states. Century operates a fleet of trucks in the private carriage of its products for delivery to customers and for the transport of product components from vendors to its manufacturing facilities throughout an area embracing all states east of North Dakota, South Dakota, Nebraska, Kansas, Oklahoma, Arkansas and Louisiana with the exception of Vermont. Century's vehicles have not operated in Vermont since September 1982 and will not operate in Vermont as a result of the cost of the requirements imposed through enactment of No. 172 of the Acts of 1982 (1981 Adjourned) Session of the Vermont Legislature.

64. General Cable Company is a corporation organized under the laws of the State of Connecticut with its principal place of business in Greenwich, Connecticut. General is a manufacturer of various wire products manufactured at plants located throughout the United States including electric wiring custom manufactured in Verment. General is a supplier of electric cords manufactured to specifications for Century for use with their electric arc-welders and electric battery chargers. Since Century vehicles no longer operate in Vermont, General

must transport its electric cords for Century to another of its facilities in Massachusetts for reloading of the cords onto Century vehicles.

65. Claremont Lumber Company, Inc. (Claremont) is a corporation organized under the laws of the State of Maine with its principal place of business in Claremont, New Hampshire. Claremont operates a saw mill at its principal place of business manufacturing various lumber products for sale at wholesale with major emphasis on the manufacture of furniture grade products. Sawdust is a major by-product of its manufacturing process which historically has been sold to dairy farmers in the region for use as bedding required under rules of the United States Department of Agriculture.

66. Prior to July 1, 1982 Claremont provided deliveries of its sawdust to approximately 50 dairy farms in Vermont utilizing its own New Hampshire registered truck. Each delivery was of about 46 to 48 cubic yards and delivery frequency ranged from one per month to some smaller dairy farms to three times weekly for larger dairy farms.

67. On June 18, 1982 Claremont advised its Vermont sawdust customers that it would no longer make sawdust deliveries to points in Vermont because of the new requirements imposed by the Agency of Transportation as a result of enactment of No. 172 of the Acts of the 1982 (1981 Adjourned) Session of the Vermont Legislature.

68. Of the original 50 Vermont dairy farms to which Claremont provided sawdust prior to implementation of the new law, four are continuing to receive sawdust from Claremont by using their own Vermont-based farm vehicles and the remainder are securing their sawdust from other sources.

69. The Notice of Class Action Certification required by the Court in its Order date November 30, 1982 was published in TRANSPORT TOPICS December 13, 1982.

70. Henry James Beli operates a small farm near West Arlington, Vermont and has one motor vehicle registered in Vermont for use in bringing farm supplies to his farm and delivering his farm products to market. His farm is not directly connected to any Vermont highway. The only access to his farm is from a New York State highway and, under these circumstances, his mailing address is located in Salem, New York, most of his farm supplies come from New York State sources and his farm products are sold in New York State markets.

71. Act No. 172 altered the fee structure paid to the State of Vermont by foreign registered motor trucks in the following manner:

(a) The $40.00 annual permit fee previously provided for under 23 V.S.A. 415 was replaced by a $50.00 annual diesel fuel user license fee (23 V.S.A. 3007) and a $50.00 annual non-diesel fuel users license fee (23 V.S.A. 415 as amended).

(b) The $40.00 single trip permit fee previously provided for under 23 V.S.A. 415a was repealed. This fee was replaced by a non-diesel fuel users single trip license fee at $50.00 (23 V.S.A. 415(C) as amended) and a diesel fuel users single trip permit fee of $50.00 (23 V.S.A. 3010(a)).

(c) The entry fee of $15.00 and $25.00 previously imposed under 23 V.S.A. 417 were repealed. A $10.00 retaliatory entry fee, which is not being contested in this case, was substituted for the previously imposed entry fees.

(d) A diesel fuel tax of 14 cents per gallon was imposed (23 V.S.A. § 3003).

72. All United States jurisdictions impose registration licensure with attendant fees on their domiciliary

motor trucks. Vermont's tax is set forth in 23 V.S.A. 362 and 367. The tax is based upon rates per 1,000 pounds which increase at interval weight levels of the vehicle. Sections 362 and 367 impose this registration tax on all trucks, without regard to domicile. 23 V.S.A. 411, however exempts from the payments called for under 362 and 367, all foreign trucks which have complied with the registration fees imposed by their own jurisdiction, which such jurisdiction affords the same reciprocity to Vermont domiciliaries. Virtually all motor trucks pass freely, as far as compliance with registration requirements are concerned in interstate commerce throughout the nation if they have complied with the registration requirements of their state of domicile. Such free passage between the states is based upon reciprocity agreements, understandings or declarations of the states pursuant to statutory authority similar to that found in 23 V.S.A. 411.

OPINION

In this class action, Plaintiffs challenge the constitutionality of certain fees imposed by the State of Vermont upon the use of motor trucks within the State. The statutes in issue, 23 V.S.A. § 3007 and 23 V.S.A. § 415, authorize an annual fee of $50.00 for diesel fuel and non-diesel fuel user licenses. 23 V.S.A. § 415(c) and 23 V.S.A. § 3010(a) impose a single trip permit fee of $50.00 which may be purchased in lieu of the annual license. Plaintiffs claim that the imposition of these fees on foreign-based trucks using Vermont highways violates the Commerce Clause, the Privileges and Immunities Clause and the Supremacy Clause of the United States Constitution and Chapter 1, Art. 9 of the Vermont Constitution.

A state is not barred from requiring interstate commerce to bear its fair share of the cost of providing benefits and protections for its activities. Therefore, a state tax on interstate commerce is valid if (1) it is applied

to an activity with a substantial nexus to the taxing state; (2) is fairly apportioned; (3) does not discriminate against interstate commerce; and (4) is fairly related to the services provided by the state. *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274, 279 (1976). The practical effect of the taxing statute and not its formal language is controlling. *Id.*; *American Trucking Assns., Inc. v. Conway*, 142 Vt. 17, 21, 451 A.2d 42 (1982). Thus, although the licensing statutes contested herein are purportedly non-discriminatory on their faces, imposing a fee on all trucks weighing over 18000 pounds regardless of whether they are foreign or Vermont registered vehicles, constitutional scrutiny is not precluded. Our focus is not on the lack of overt disparity in the statutes, but rather on whether the fee system results in actual discrimination which has an adverse affect on interstate commerce.

Moreover, reluctant as this Court is to impute a discriminatory intent to the legislature, we cannot but be aware of the consequences of the most recent amendments to the licensing and registration statutes. Previous versions of 23 V.S.A. § 3007 and § 415 imposed a fee only on foreign-registered trucks weighing over 18000 pounds. When these statutes were attacked on constitutional grounds, the legislature enlarged their applicability to cover all trucks over 18000 pounds. Simultaneously, it reduced the registration fee for Vermont trucks by the amount of the fuel user license fee, $50.00. In practice, therefore, Vermont-registered trucks receive a credit in the amount of the license fee against the cost of registration.

Although Defendant would have this Court ignore the enactment of a registration fee deduction, we find its effect on the registration fee structure too irrational to be merely the result of benign legislative intent. Thus, we must consider both the registration and the licensing

fees in testing the instant taxing scheme by the four criteria noted above.

In determining whether the statutes at issue violate the Commerce Clause, we must compare "the costs imposed on foreign and domestic trucks in return for the services provided by Vermont." *American Trucking Assns. v. Conway, supra* at 21. "Only by comparing the cost per mile imposed by the fee systems on foreign as opposed to Vermont trucks can [the] Court assess whether the system . . . [is] actually discriminatory." *Id.* at 22.

The data submitted by the parties substantiates Plaintiffs' contention that out-of-state truckers are required to pay more in fees than are Vermont-registered truckers, when such costs are computed on a per mile basis. This additional cost per mile is not a result of additional services required for out-of-state trucks. We conclude, therefore, that the statutes contested herein unfairly discriminate against interstate commerce, in violation of the third prong of the *Complete Auto* test, and are not fairly related to the services provided by the State, in violation of the fourth prong.

The disparity between the costs imposed on Vermont and foreign registered trucks is far from insubstantial. Foreign registered trucks pay, on the average, .0632 cents per mile in user fees; Vermont registered trucks pay an average of .0029 in such fees. Attachment 3 clearly evidences the grossly unequal burden the present system imposes on foreign-based carriers. Moreover, if the deduction granted Vermont trucks is taken into account, the disparity between the fees imposed is even greater.

In practical effect, therefore, a Vermont-registered truck pays f[a]r less in average per-mile operating costs for the use of Vermont highways than does a foreign based vehicle. The difference in cost is not based on any

greater burden imposed on the Vermont highways by the foreign-based truck, nor any greater benefit derived by a foreign-based truck. No offset for the discrimination against interstate commerce is present either in complimentary domestic taxes or in other states' use permit fees. (See attachment 4). Many states impose no permit fee at all, and none impose a fee as high as Vermont does.

Since the discrimination against interstate commerce resulting from the contested permit system is not offset by complimentary domestic taxes or by foreign taxes, the statutes violate the Commerce Clause.

In view of the foregoing, it is hereby Adjudged and Decreed that sections 3007, 415, and 3010 are violative of the Commerce Clause of the U.S. Constitution.

Dated at Montpelier, Vermont this 31st day of August, 1983.

/s/ James L. Morse
JAMES L. MORSE
Presiding Judge

/s/ Willis C. Bragg
WILLIS C. BRAGG
Assistant Judge

/s/ NA
PATRICIA B. JENSEN
Assistant Judge

ATTACHMENT 1

VERMONT FOREIGN-BASED VEHICLE REGISTRANTS HIGHWAY USE OPERATING CHARACTERISTICS 7/01/81 - 6/30/82

Number of Carriers:	1,247
Number of Plates:	21,055
Number of Trip Permits:	2,818
Miles Everywhere:	6,760,855,458
Miles in Vermont:	18,890,483
Percent of Miles in Vermont:	0.28%
Total Plate Cost:	$1,052,750
Total Trip Permit Cost:	$ 140,900
Total Cost:	$1,193,650
Average Cost/Mile:	$ 0.0632

ATTACHMENT 2

VERMONT BASED VEHICLE REGISTRANTS
HIGHWAY USE OPERATING CHARACTERISTICS
7/01/81 - 6/30/82

Number of Carriers:	237
Number of Permits:	681
Miles Everywhere:	29,689,431
Miles in Vermont:	11,640,139
Percent of Miles in Vermont:	39.20%
Total Plate Cost:	$34,050
Average Cost/Mile:	$0.0029

ATTACHMENT 3

FUEL

VERMONT PERMIT FEE COST COMPARISON
VERMONT-BASED CARRIERS v.
FOREIGN-BASED CARRIERS
7/1/81 - 6/30/82

Vermont-Based			Foreign-Based	
% Total	Number	Cost/Mile	Number	% Total
0.42%	1	over 1.00	99	7.95%
0.00%	0	90-100¢	4	0.32%
0.00%	0	80- 90¢	15	1.20%
0.00%	0	70- 80¢	15	1.20%
0.00%	0	60- 70¢	17	1.36%
0.84%	2	50- 60¢	47	3.77%
0.42%	1	40- 50¢	41	3.29%
0.42%	1	30- 40¢	72	5.78%
0.42%	1	20- 30¢	140	11.24%
1.69%	4	10- 20¢	248	19.90%
0.00%	0	9- 10¢	22	1.77%
1.69%	4	8- 9¢	35	2.81%
0.84%	2	7- 8¢	42	3.37%
0.84%	2	6- 7¢	40	3.21%
2.95%	7	5- 6¢	49	3.93%
1.27%	3	4- 5¢	49	3.93%
2.11%	5	3- 4¢	67	5.38%
5.91%	14	2- 3¢	60	4.82%
12.24%	29	1- 2¢	90	7.22%
1.69%	4	0.9-1.0¢	12	0.96%
4.22%	10	0.8-0.9¢	11	0.88%
4.22%	10	0.7-0.8¢	8	0.64%
1.69%	4	0.6-0.7¢	17	1.36%
5.49%	13	0.5-0.6¢	11	0.88%
7.17%	17	0.4-0.5¢	14	1.12%
7.59%	18	0.3-0.4¢	8	0.64%
16.88%	40	0.2-0.3¢	9	0.72%
14.35%	34	0.1-0.2¢	2	0.16%
4.64%	11	under 0.1¢	2	0.16%

ATTACHMENT 4

Fuel Reporting Law Vehicle Annual Permit Fees
For the Fifty States and the
District of Columbia

State	Fee	State	Fee
Alabama	$12.00	Montana	$ .00
Alaska	.00	Nebraska	.00
Arizona	.00	Nevada	.00
Arkansas	10.00	New Hampshire	10.00
California	.00	New Jersey	6.00
Colorado	.00	New Mexico	.00
Connecticut	10.00	New York	.00
Delaware	10.00	North Carolina	1.00
Florida	8.00	North Dakota	.00
Georgia	3.00	Ohio	2.00
Hawaii	.00	Oklahoma	.00
Idaho	.00	Oregon	.00
Illinois	.00	Pennsylvania	25.00
Indiana	5.00	Rhode Island	10.00
Iowa	.00	South Carolina	4.00
Kansas	.00	South Dakota	.25
Kentucky	10.00	Tennessee	.00
Louisiana	.00	Texas	.00
Maine	10.00	Utah	.00
Maryland	25.00	Vermont	50.00
Massachusetts	10.00	Virginia	10.00
Michigan	12.00	Washington	.00
Minnesota	.00	West Virginia	10.00
Mississippi	12.00	Wisconsin	.00
Missouri	5.00	Wyoming	.00
		Dist. of Columbia	.00

APPENDIX H

STATE OF VERMONT)
) ss.
WASHINGTON COUNTY)

Washington Superior Court

Docket No. S217-81 WnC

AMERICAN TRUCKING ASSOCIATION[S], INC.,
INTERNATIONAL TRANSPORT, INC., and
G. H. HARNUM, INC.

v.

WILLIAM CONWAY, PAUL PHILBROOK,
RICHARD SNELLING, and THOMAS EVSLIN

AMENDED FINDINGS OF FACT

This cause was remanded for further Findings of Fact by Entry Order of the Supreme Court, dated September 7, 1982. A conference was held on October 14, 1982, and proposed amendments to the original Findings of Fact and a Memorandum were filed on November 15, November 16 and November 17, 1982.

In accordance with the Remand Order and the Opinion of the Supreme Court, the trial court amends its original Findings of Facts as follows:

1. Add Finding No. 5A: "If Plaintiff International Transport, Inc., had tax costs per mile of operation under Act No. 87 in every state equal to its projected 36.257 cents per mile tax cost for operation in Vermont, the said Plaintiff would incur a total annual tax cost of approximately $32,000,000, which amount is far in excess of said Plaintiff's net earnings for 1980 of $3,724,227.65".

2. Add Finding No. 8A: "If Plaintiff G. H. Harnum, Inc. were subjected to per mile tax costs in all states identical to the projected 22.5 cents per mile tax costs for its operations in the State of Vermont under Act No. 87, the total annual tax cost to the said Plaintiff would be $279,225.00, a figure in excess of said Plaintiff's net corporate earnings for 1980".

3. Finding No. 11 is amended to read: "A survey conducted by Plaintiff of foreign motor carriers presently operating within the state of Vermont pursuant to 23 V.S.A. § 415 and § 417 indicates that the projected cost per mile *based on miles operated within Vermont in 1980* ranges from a high of $9.70 per mile to a low of 3.6 cents per mile. This computation includes the payment of the $15 fee under 23 V.S.A. § 417 for each trip into the state. *The average projected cost for all such foreign motor carriers is 18 cents per mile. The application of the $25 fee provided for under 23 V.S.A. § 417 to miles operated in Vermont in 1980 would result in a high cost per mile of $14.70 and a low cost of 5.7 cents a mile. The average cost for all such foreign carriers if the $25 fee was paid would be 26.3 cents a mile. Foreign-registered carriers that elect to use the § 415(a) single permit system, will experience a Vermont tax cost of 21.7 cents per mile based on their 1980 mileage*". [Added or changed wording is italicized.]

4. Finding No. 13 is amended to read: "Since Vermont registered motor trucks do not pay fees set forth in 23 V.S.A. § 415, § 415(a) and § 417, certain *individual* foreign motor carriers *enter the state so frequently that they would* in fact save in their costs of operation if they were to register some or all of their motor vehicles in the state of Vermont. *However, there is no credible evidence that the total of user fees paid per mile or pound of gross weight by all foreign-registered vehicles as a class for use of Vermont highways are higher than the total of such fees paid by all Vermont-registered*

vehicles as a class through registration fees and the Vehicle Purchase and Use Tax". [Added wording is italicized.]

5. Finding No. 17 is amended to read: "In the absence of the reciprocity *formerly provided under 23 V.S.A. § 419,* Vermont registered trucks with gross weight in excess of 18,000 pounds pay substantial highway user fees in numerous other states. In New Hampshire and New Jersey these taxes take the form of "counterpart" or "retaliatory" fees identical to the entry fees imposed upon foreign trucks using Vermont highways. [Added wording is italicized.]

6. Finding No. 19 is amended to read: "During the years 1978 and 1980, trucks weighing in excess of 18,000 pounds gross weight constituted approximately 9.89 percent of the total vehicular traffic on the state highway system and *contributed approximately 6 percent of such total vehicular traffic on all highways in Vermont (both the state highway system and the local road system)*". [Changed wording is italicized.]

7. Finding No. 20 is amended by striking "1979" in the first line thereof.

8. Add Finding No. 21A: "Total miles travelled on all Vermont highways in 1979 by all vehicles was 3,714,300,000 vehicle miles".

9. Finding No. 27 is amended to read as follows: "There is no evidence that *the total of* user fees paid PER MILE OR PER POUND OF GROSS WEIGHT by *all* foreign vehicles *as a class* for use of Vermont highways are higher than *the total of* such fees paid by *all* Vermont registered vehicles *as a class* through registration fees and the Vehicle Purchase and Use Tax". [Added wording is underlined and wording omitted in the Supreme Court opinion is capitalized.]

10. Add Finding No. 28: "As stated in summary form in the original Finding No. 27, there is no evidence

of the total costs and costs per mile for use of *Vermont* highways by trucks registered in Vermont, enabling a comparison to be made of such costs with those of the individual Plaintiffs or foreign-registered trucks as a class for use of Vermont highways. The only evidence on this issue—as to which no Requests to Find were originally made by Plaintiffs or Defendants—is insufficient and unsupported and does not permit the Court to reasonably make Findings based thereon".

11. Add Finding No. 29: "The Plaintiffs now request the Court to extrapolate and find, without benefit of any expert analysis, the comparative mileage costs for Vermont-registered trucks from the raw data contained in the 1977 Federal Census of Transportation (Plaintiff's Exhibit 7). This Exhibit contains *1977* mileage data for *combined interstate and intrastate operations.* In addition, there is no evidence in the record as to estimated truck useful life or any other factual basis for computing the average annualized Vermont Purchase and Use Tax payments by Vermont-registered trucks. Cost findings derived from this *1977* raw data *from combined interstate and intrastate operations* are simply not comparable to Plaintiff's cost data for foreign-registered trucks derived from *1980* operations *on Vermont highways,* without even considering the lack of foundation for making a per mile Purchase and use Tax allocation for Vermont-registered vehicles".

12. Add Finding No. 30: "The only other evidence in the record on the issue of comparative per mile costs is the unsupported opinion offered by witness McArthur for the State that miles travelled by Vermont-registered and foreign-registered trucks in *1979* were in the same proportion as vehicle counts in *1978* and *1980.* The witness did not give the breakdown of 1979 truck miles, gave no reason for his opinion and no supporting data. The Court, therefore, finds the opinion not credible".

13. Add Finding No. 31: "There is no credible evidence in the record from which the trial court can *for comparable time periods* determine the number of miles travelled *on Vermont highways* by trucks registered in Vermont (and thus the tax costs per mile) as opposed to the number of miles travelled *on Vermont highways* by foreign-registered trucks (and thus the tax costs per mile)".

14. Add Finding No. 32: "The specific impacts of the $40 permit and the $15 or $25 entry fee (23 V.S.A. § 415, 417) and the $40 single entry fee (23 V.S.A. & 415(a)) as to which there is evidence in the record are covered by findings Nos. 5, 8, 10, 11, 13, 22 and 23".

15. Add Finding No. 33: "There is no evidence in the record as to the impact of the Vermont registration fee and the Vermont Vehicle Purchase and Use Tax System except as discussed in Findings Nos. 28 and 29".

16. Add Finding No. 34: "Plaintiffs do not seek refund of taxes paid under the tax scheme in effect prior to Act No. 87 and thus findings on its separate or comparative impact are not required".

17. Add Finding No. 35: "A foreign-registered truck derives no greater benefit from and imposes no greater burden upon Vermont highways than does a Vermont-registered truck".

Dated this 5th day of August, 1983.

/s/ Edwin H. Amidon, Jr.
EDWIN H. AMIDON, JR.
Acting Superior Judge

/s/ Patricia L. Jensen
PATRICIA L. JENSEN
Assistant Judge

APPENDIX I

STATE OF VERMONT)
) ss.
WASHINGTON COUNTY)

WASHINGTON SUPERIOR COURT

Docket No. S217-81 WnC

AMERICAN TRUCKING ASSOCIATION[S], INC.,
INTERNATIONAL TRANSPORT, INC., and
G. H. HARNUM, INC.

v.

WILLIAM CONWAY, PAUL PHILBROOK,
RICHARD SNELLING, and THOMAS EVSLIN

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND JUDGMENT ORDER

This cause came on for hearing on the merits on August 6 and 7, 1981. Ralph Foote, Esq., and Robert Moyer, Esq., represented the Plaintiffs, and Robert Schwartz, Esq., represented the Defendants.

Findings of Fact

Based on the parties' Stipulation of Facts, the pleadings and the evidence at the hearing on the merits and the preliminary injunction hearing, the Court makes the following findings of fact:

1. The Court hereby adopts and incorporates by reference the Stipulation of Facts, filed August 6, 1981.

2. Plaintiff International Transport, Inc. registers approximately 1200 of its trucks in the State of Minnesota and 250 in the State of Oklahoma.

3. During the time period from September 1, 1979, through August 30, 1980 the total fleet mileage of International's tractors was 88,272,458 miles. International's mileage in the State of Vermont during the said time period was 34,434 miles. Vermont mileage as a percentage of total mileage during the said time frame was .039% or roughly 4 out of every 10,000 miles travelled by International's vehicles when taken as a whole.

4. In calendar year 1980, International's trucks made 227 entries into the State of Vermont and accrued registration fees under 23 V.S.A. 415, 415a and 417 of $4,540, representing a per mile cost of 13.196 cents.

5. Based upon the amendments to 23 V.S.A. 415, 415a and 417, International projects its annual costs to be approximately $12.485 in fees payable to the State of Vermont. This projection is based upon the number of entries into Vermont made by International Motor Trucks in calendar year 1980. Based upon that projected cost, and International's experience of 1980 for miles travelled within Vermont, International projects its cost per mile as approximately 36.275 cents.

6. G. H. Harnum, Inc. intends to qualify approximately 15 of its vehicles under the amendments to 23 V.S.A. 415 and to pay trip fees pursuant to 23 V.S.A. 417. If one of those 15 qualified vehicles is not available to bring freight into the State of Vermont at any given time, Harnum intends to transfer freight to such a qualified vehicle at its Massachusetts or New Hampshire terminals for delivery into the State.

7. Harnum's total fleet mileage for calendar year 1980 was approximately 1,241,000 miles. Its approximate mileage within the State of Vermont was 22,000 miles which constitutes roughly ½ of 1 percent of its total mileage.

8. Based upon its 1980 experience of 290 trips into the State of Vermont, Harnum projects its registration

costs under 23 V.S.A. 415 and 417 to be $600 for registration of 15 vehicles at $40 per vehicle, and $4,350 in trip fees for a total of $4,950. On a per mile basis, Harnum's cost per mile based upon its 1980 experience within the State of Vermont would be 22.5 cents per mile.

9. Due to the nature of the trucking industry, it is impossible for foreign motor carriers to determine how many or which of their motor trucks will be necessary or available for deliveries within the State of Vermont at any given time in the future. This is due to the necessity for flexibility in routing of trucks and the lack of advance notice as to where each individual truck will be needed at any given time.

10. The terms of 23 V.S.A. 415, 415a, and 417 impose a system of flat rates of payment triggered by entries into the State. When costs incurred by foreign motor carriers under those statutes are calculated on a per mile basis for operations within the State, different carriers pay very different costs per mile.

11. A survey conducted by Plaintiff, American Trucking Associations, Inc., of foreign motor carriers presently operating within the State of Vermont pursuant to 23 V.S.A. 415 indicates that the cost per mile ranges from a high of $9.70 a mile to a low of 3.6 cents a mile. This computation also assumes the payment of the $15 fee under 23 V.S.A. 417 for each trip into the State. The application of the $25 fee provided for under 23 V.S.A. 417 results in equally divergent, higher costs per mile for individual foreign motor carriers.

12. The lowest average mileage per trip into Vermont for any of the foreign carriers surveyed was by Twilight Color Chemical which entered the State 38 times in 1980, with a total mileage of 150 miles, for an average of 3.9 miles per trip. The highest average mileage per trip into Vermont for any of the foreign carriers surveyed was by

Everett Prescott, Incorporated which averaged nearly 450 miles per trip during 1980.

13. Since Vermont registered motor trucks do not pay fees set forth in 23 V.S.A. 415, 415a and 417, certain foreign motor carriers would in fact save in their costs of operation if they were to register some or all of their motor vehicles in the State of Vermont.

14. All of the United States jurisdictions impose registration licensure on the domiciliary motor trucks. It is thus a fact that virtually all motor trucks pass freely, as far as compliance with registration requirements is concerned, in interstate commerce throughout the nation if they have complied with the registration requirements of their state of domicile.

15. Wear and tear on any given portion of a highway is in direct proportion to the weight of the vehicle. Trucks of the plaintiff class impose significant wear and tear annually on Vermont highways. Vermont spends a significant portion of its available revenues annually in the repair of its highway system.

16. 23 V.S.A. 419, which was repealed pursuant to House Bill 248, effective July 1, 1981, authorized the Commissioner of Motor Vehicles to enter into reciprocal agreements with appropriate officials from other jurisdictions, excepting motor carriers from those jurisdictions from all or any portion of the fees described in 23 V.S.A. 415, 415a and 417, if such other jurisdictions exempted Vermont base-plated motor trucks from the payment of all or a portion of highway use fees imposed by such jurisdictions. At the time of repeal, such agreements were in force with 13 other States and the District of Columbia. As a practical result of the repeal of said statute, Defendant Conway cancelled nearly all existing reciprocal agreements as of June 1, 1981.

17. In the absence of reciprocity, Vermont registered trucks with gross weight in excess of 18,000 pounds pay

substantial highway user fees in numerous other states. In some states, such as New Hampshire and New Jersey, these taxes take the form of "counterpart" or "retaliatory" fees identical to the entry fees imposed upon foreign trucks using Vermont highways.

18. Trucks weighing in excess of 18,000 pounds cause considerably more wear and tear on highways than smaller vehicles and a large proportion of highway maintenance costs is attributable to usage by such vehicles.

19. During the years 1978 and 1980, trucks weighing in excess of 18,000 pounds gross weight constituted approximately 9.89 percent of the total traffic on Vermont highways and during the year 1979 constituted approximately 6 percent of such total traffic.

20. During the same years (1978, 1979 and 1980), approximately 53.9 percent of the trucks weighing over 18,000 pounds gross weight using Vermont highways were registered in Vermont and approximately 46.1 percent of such trucks were registered in other states or Canada.

21. In the years 1978 and 1980, 61.9 percent of "tractor semi-trailers" using Vermont highways were registered in other states or Canada and 38.1 percent were registered in Vermont.

22. Under the new entry fee system, trucks weighing in excess of 18,000 pounds gross weight registered in other states or Canada will in fiscal year 1982 pay approximately $7,500,000 into the "Transportation Fund" for construction and maintenance of Vermont highways.

23. Trucks weighing in excess of 18,000 pounds gross weight registered in Vermont will in fiscal year 1982 pay registration fees and purchase and use taxes of approximately $7,800,000 into the "Transportation Fund" for construction and maintenance of Vermont highways.

24. In fiscal year 1981, trucks weighing in excess of 18,000 pounds gross weight registered in Vermont paid $7,500,000 and such trucks registered in other states or Canada paid $2,700,000 into the "Transportation Fund".

25. Vermont State highways cost an average of $6,447.90 per mile to maintain in fiscal year 1981, for a total of approximately $16,887,000. (See Plaintiff's Exhibit 6 for total mileage of highways maintained by the State.)

26. Highway user fees charged to trucks registered other than in Vermont under the new entry fee system are not excessive in relation to the road privileges granted.

27. There is no evidence that the user fees paid per mile or per pound of gross weight by foreign vehicles for use of Vermont highways are higher than such fees paid by Vermont registered vehicles through registration fees and the vehicle purchase and use tax.

Conclusions of Law

The Court will first address Plaintiff's primary contention that the Vermont truck permit system for vehicles used in interstate commerce violates the Commerce Clause of the United States Constitution.

Complete Auto Transit, Inc., v. Brady, 430 U.S. 274, 279 (1977), holds that a State tax on interstate commerce will be sustained

> ". . . when the tax is applied to an activity with a substantial nexus with the taxing State, is fairly apportioned, does not discriminate against interstate commerce, and is fairly related to the services provided by the State."

Plaintiffs take the position that the entry fee system discriminates against trucks registered outside of Vermont and that the fees are not fairly related to the serv-

ices provided by Vermont. No claim is made that Plaintiffs activities have an insufficient nexus with Vermont or that the entry fees are not fairly apportioned to activities within Vermont.

We conclude that the entry fees are not discriminatory since they form part of a single structure of user fees for Vermont roads and that the per entry measurement fairly relates the total fees paid to services provided to trucks registered in other states and Canada.

The Commerce Clause does not require that taxes or user fees be imposed upon interstate commerce in exactly the same form as taxes or user fees imposed upon domestic activities if the fees levied on interstate commerce are "compensatory" for taxes or fees levied on a similar event as a domestic tax or fee and there is substantial equality of treatment between local and interstate commerce. See *Maryland v. Louisiana*, 49 U.S.L.W. 4562, 4571 (1981); *H[e]nneford v. Silas Mason Co.*, 300 U.S. 577 (1937); *Alaska v. Arctic Maid*, 366 U.S. 199 (1961).

Trucks domiciled in Vermont are required to pay substantial registration fees based upon weight and must also pay a purchase and use tax based upon purchase price, both paid into the "Transportation Fund". See Subchapter 2, Chapter 7 of Title 23 and 32 V.S.A. 8901 et seq. Subchapter 3, Chapter of Title 23 imposes entry or trip fees upon trucks registered in other states or Canada. There is no showing in this case that the amount of revenue collected from foreign trucks under the Vermont scheme is significantly disproportionate to that collected from Vermont registered trucks in terms of miles travelled, fuel usage or any other measure.

Plaintiffs argue that the user fees for foreign trucks constitute an additional discriminatory tax on them because they must also pay base registration fees in their State of domicile. This contention ignores the fact that Vermont registered trucks—which no longer have reci-

procity in other states due to the repeal of 23 V.S.A. § 419—must similarly pay so-called "third tier" user fees in other states. The desirability of reciprocity is a legislative rather than a judicial issue. So-called "third tier" fees over and above base registration fees and fuel taxes, although severely criticized by Plaintiff Association as an unwise exercise of legislative discretion, have long been held constitutional. See, *e.g.*, *B & L Motor Freight, Inc. v. Heymann*, 293 A.2d 711 (A.J. 1972).

We thus conclude that the Vermont truck permit fee system is a compensatory tax which does not discriminate against interstate commerce.

Plaintiffs' second argument under the *Complete Auto Transit* rule is that the trip fees collected by Vermont under Subchapter 3 are not fairly related to services provided by Vermont. The issue here is whether the Commerce Clause requires road usage fees to be computed in accordance with mileage or fuel use or whether a flat fee per trip is constitutionally permissible.

No case has interpreted the constitutionality of non-mileage related fees since the decision in *Commonwealth Edison Co. v. State of Montana*, 49 U.S.L.W. 4957 (July 1981) which held that the "measure of the tax must be reasonably related to the extent of the contact". 49 U.S.L.W. 4962. However, prior cases more closely on point have clearly held that the measure of the contact need not be precise and exact, and that a flat fee based upon weight or on the value of a vehicle is constitutionally permissible unless the *total* collected from *all* interstate users is proven to be excessive in relation to the road privileges granted. See *Capital Greyhound Lines v. Brice*, 339 U.S. 542 (1950); *Bode v. Barrett*, 106 N.E. 2d 521, 531-532 (Ill. 1952), aff'd, 344 U.S. 583 (1953).

In view of the strong presumption in favor of constitutionality and the fact that the ratio of total highway user fees paid by foreign trucks weighing in excess of

18,000 pounds gross weight under the new system to the total cost of maintaining Vermont highways closely approximates the ratio of usage of Vermont highways by such foreign trucks to the total usage by all such trucks, we conclude that the per entry measurement meets the reasonably related test of *Complete Auto Transit*. This conclusion is further supported by the apparent holding of *Commonwealth Edison Co., supra*, 4962, that a Court need not make a detailed factual inquiry into the relationship between revenues generated by a tax and costs incurred on account of the taxed activity and that the only issue under the fourth prong of the *Complete Auto Transit* test is whether the measure of the tax on its face bears any relationship to the amount of activity within the taxing State. In this case, the entry fee system is clearly proportional to activities by interstate carriers within the State, although not as precisely proportional as a mileage or fuel use tax.

We now turn to Plaintiffs' contention that the entry fee system for trucks based in other states violates the Equal Protection Clause and the Privileges and Immunities Clause of the United States Constitution (§ 1 of the Fourteenth Amendment and Clause 3, § 8 of Article I) and the Proportional Contribution Clause of the Vermont Constitution (Chapter 1, Article 9).

The basic argument is that measurement of the road use tax by number of entries rather than a flat fee based upon weight or purchase cost as in the case of Vermont based trucks is a discriminatory and irrational classification. We disagree. The State claims that the purpose for the statutory distinction is to make road usage fees payable by foreign trucks more proportional to their actual usage of Vermont highways. We find this to be a reasonable and non-arbitrary distinction based upon the difference in level of usage of Vermont highways between individual Vermont-domiciled trucks and individual foreign trucks. See *Vermont Motor Inns, Inc. v. Town of Hartford*, 134 Vt. 52 (1975).

Plaintiffs also contend that the entry fees are void pursuant to the Supremacy Clause of the United States Constitution (Clause 2 of Article VI). The short answer to this argument is that 49 USC 11506, cited by Plaintiffs as authority for the proposition that Federal law has pre-empted at least the enforcement provisions of the Vermont entry fee system, covers only "State *registration* requirements" (emphasis supplied) and by its own terms does not apply to the highway use and trip permits required under 23 V.S.A. §§ 415, 415a and 417.

Judgment Order

It is hereby ordered and adjudged that Plaintiffs' action is dismissed with prejudice and that Defendants recover of Plaintiffs their costs of action.

Dated this 1st day of January, 1982.

/s/ Edwin H. Amidon, Jr.
/s/ Patricia D. Jones

APPENDIX J

STATE OF VERMONT)
) ss.
WASHINGTON COUNTY)

WASHINGTON SUPERIOR COURT

Docket No. S-217-81

AMERICAN TRUCKING ASSOCIATIONS, *et al.*

vs.

WILLIAM CONWAY, Vermont Commissioner of Motor Vehicles, *et al.*

ORDER

This cause came on for hearing on June 3, 1981, on Plaintiffs' Application for Temporary Restraining Order. Ralph Foote, Esquire and Robert Moyer, Esquire represented the Plaintiffs and Robert Schwartz, Esquire represented the Defendants.

Based upon review of the pleadings and the evidence at the hearing, the Plaintiffs' Application for Temporary Restraining Order is hereby DENIED.

The Court concludes that the Plaintiffs have raised sufficiently serious issues relating to the constitutionality of the subject law as to make them a fair ground for litigation.

However, the Court finds that no irreparable injury will occur to Plaintiffs should the new fee system be permitted to go into effect. Defendants' records will permit any excess fees wrongfully collected to be exactly determined and speedily refunded to specific Plaintiffs

should they prevail on the merits. Also, issues as to lack of adequate notice of the reciprocity cancellations can be raised in any individual prosecutions which may occur as the result of driving unregistered vehicles during the next few weeks.

This cause is hereby advanced for early trial on the merits during the month of July, 1981.

Dated at Montpelier, Vermont this 4th day of June, 1981.

/s/ Edwin H. Amidon, Jr.
EDWIN H. AMIDON, JR.
Presiding Judge

APPENDIX K

UNITED STATES DISTRICT COURT
D. VERMONT

Civ. A. No. 81-155

AMERICAN TRUCKING ASSOCIATIONS, INC., INTERNATIONAL TRANSPORT, INC., and G. H. HARNUM, INC., Individually and on behalf of all others similarly situated

v.

WILLIAM CONWAY, Vermont Commissioner of Motor Vehicles, PAUL PHILBROOK, Vermont Commissioner of Public Safety, and RICHARD SNELLING, Governor of the State of Vermont, Each individually and in their official capacities

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May 29, 1981

MEMORANDUM OF DECISION

HOLDEN, Chief Judge.

Plaintiffs bring this action seeking declaratory, injunctive and monetary relief from recent amendments to Vermont statutes requiring the purchase of permits for interstate motor carrier vehicles registered out of state. The new amendments greatly increase the cost of the permits and remove exemptions for vehicles registered in other jurisdictions having a reciprocal fee waiver agreement with Vermont.

In considerable haste and with a strong sense of urgency, plaintiffs American Trucking Associations, Inc., International Transport, Inc., and G. H. Harnum, Inc.,

as individuals and representatives of a class of interstate motor carriers, on May 26, 1981 invoked the court's jurisdiction to obtain a temporary restraining order and preliminary injunction enjoining the defendant Conway, the Commissioner of Motor Vehicles for the State of Vermont, from assessing or collecting increased fees imposed by the enactment of the Vermont General Assembly of House Bill 248 which amended the fee levels previously set by 23 V.S.A. §§ 415, 415a and 417. Further equitable relief is sought to restrain the defendant Conway from terminating the reciprocal agreements with his counterparts in other states which had the effect of waiving the registration and license permits applicable to foreign registered motor truck carriers, as provided in 23 V.S.A. § 419. According to the complaint, the recision of the reciprocal agreements will become effective June 1, 1981, unless interdicted by injunctive relief emanating from this court prior to the effective date.

Upon consideration of the evidence and arguments presented at an expedited hearing May 28, 1981, the court finds there is a lion in the path of the equitable relief which the plaintiffs seek in this court. The barrier appears by way of the Tax Injunction Act of 1937, 50 Stat. 738, 28 U.S.C. § 1341, which provides:

> The district courts shall not enjoin, suspend, or restrain the assessment, levy or collection of any tax under State law where a plain, speedy and efficient remedy may be had in the courts of such State.

The Tax Injunction Act applies if the permit fees assessed in 23 V.S.A. §§ 415, 415a, and 417 constitute a tax within the meaning of Section 1341. This question is one of statutory construction, and is governed by federal law. The United States District Court for the District of Connecticut recently considered the "tax" question in regard to a similar fee assessed by the State of Connecticut. *American Trucking Association[s] v. O'Neill*, No. 81-267, slip op. at 3-7 (filed May 6, 1981). The

court found that the regulatory activities necessary to administer the registration statute could be funded for less than one percent of the revenue that would be generated from a $40.00 fee. *Id.* at 6. The Vermont fees, which are at least $40.00 per truck, must likewise exceed the administrative costs of the registration program. Moreover, the other indicia of a "tax," which include the earmarking of the collected fees for a general state fund, and the intent of the legislature to raise revenue, are present in the Vermont statute. The court concludes that the permit fees are a "tax" within the meaning of the Tax Injunction Act. This preliminary finding is based upon the papers submitted and the testimonial evidence adduced at the hearing on the motion for a temporary restraining order. The plaintiffs have simply failed to show that the permit fees have any other purpose than the generation of revenue for the State of Vermont.

The remaining question for resolution is whether the Vermont state courts provide plaintiffs with a "plain, speedy, and efficient remedy" to challenge the constitutionality of the tax The legislative history of the Act indicates that this language is intended to guarantee "a full hearing and judicial determination of the controversy." *Rosewell v. LaSalle National Bank*, —— U.S. ——, ——, 101 S.Ct. 1221, 1229, 67 L.Ed.2d 464 (1981) (citing 81 Cong. Rec. 1416). "The statute has its roots in equity practice, in principles of federalism, and in recognition of the imperative need of a State to administer its own fiscal operations." *Tully v. Griffin, Inc.*, 429 U.S. 68, 73, 97 S.Ct. 219, 222, 50 L.Ed.2d 227 (1976). As a result, if the state court system provides an *adequate* and *certain* remedy, the federal courts are barred from interfering.

Plaintiffs do not raise any issue as to the speed with which a remedy may be obtained in the state court system. Plaintiffs also concede that both declaratory and injunctive relief are available in the state system. Plain-

tiffs do, however, vigorously contest the adequacy and certainty of this remedy.

The United States Supreme Court has recently considered whether the availability of declaratory and injunctive relief in a state court system constitutes a certain (plain) remedy. *Tully v. Griffin, Inc., supra.* In *Tully*, the court held that the existence of New York case law establishing a right to preliminary relief in declaratory actions attacking the constitutionality of tax statutes provided a "plain" remedy. *Id.* at 76, 97 S.Ct. at 224.

The courts of Vermont have the power to grant injunctive and declaratory relief at an early sta[g]e of a controversy concerning a tax claim to be unlawfully imposed. *Gifford Memorial Hospital v. Town of Randolph*, 119 Vt. 66, 70, 118 A.2d 480 (1955). *Beebe v. Rupert*, 114 Vt. 172, 41 A.2d 149 (1945). *See also, Wheeler v. State*, 127 Vt. 361, 249 A.2d 887 (1969) *appeal dismissed* 396 U.S. 4, 90 S.Ct. 24, 24 L.Ed.2d 4, *reh. denied* (1969). Consequently, the court concludes a plain and certain remedy exists in the Vermont state courts within the meaning of 28 U.S.C. § 1341.

The remaining question is whether the state court remedy is adequate. Some decisions have impliedly equated this requirement with the requirement of an "adequate" legal remedy which would preclude equitable jurisdiction. *See Great Lakes Dredge & Dock Co. v. Huffman*, 319 U.S. 293, 63 S.Ct. 1070, 87 L.Ed. 1407 (1943); *Hillsborough v. Cromwell*, 326 U.S. 620, 66 S.Ct. 445, 90 L.Ed. 358 (1946). The court, however, does not read these decisions to limit the operation of the Tax Injunction Act to plaintiffs having a plain, speedy and efficient remedy at law in the state courts. *But cf. American Trucking Associations v. O'Neill, supra*, slip op. at 8 (a state remedy cannot be deemed adequate unless the state has provided a statutory right to recover tax payments). Such a construction ignores the congressional

purposes underlying the Act. The Act is not merely an expression of the concept of the rule that an adequate legal remedy precludes equitable jurisdiction; it also states firm principles of federalism. *Tully v. Griffin, Inc., supra,* 429 U.S. at 73, 97 S.Ct. at 222. To the same effect is the more recent pronouncement by the Court in *Rosewell, supra,* —— U.S. at ——, 101 S.Ct. at 1236. These principles dictate that the federal court abstain from granting equitable relief when the taxpayer can resort to the state court for relief adequate and equivalent to relief sought in the federal form. *Tully v. Griffin, Inc., supra,* 429 U.S. at 76, n. 8, 97 S.Ct. at 224 n. 8; *Garrett v. Bamford,* 538 F.2d 63, 68 (3d Cir. 1976) ("If plaintiffs could bring this action in Pennsylvania courts of equity, they would have an adequate remedy").

Plaintiffs conceded in oral argument that declaratory and injunctive relief is available to them in the Vermont state system, but expressed reservations regarding the ability of a Vermont court to reimburse them for fees illegally collected.[1] An award of monetary relief is within the equitable powers of the Vermont courts. *See Thompson v. Smith,* 119 Vt. 488, 510, 129 A.2d 638 (1957). The state courts can provide every kind of re-

[1] Plaintiffs stated at oral argument that the availability of a refund of illegally collected permit fees is only available under 23 V.S.A. § 328. This statute authorizes the commissioner of motor vehicles to refund money erroneously paid into the state treasury for registration of a motor vehicle. The court need not consider whether Section 328 provides a plain, speedy, and efficient remedy within the meaning of the Tax Injunction Act, since the court has concluded that other avenues of relief are available in the Vermont Superior Courts. The court notes, however, that defendant has submitted an affidavit indicating that relief under this section is regularly granted by the commissioner. Furthermore, the court believes that a review of an adverse determination by the commissioner would be available under the state administrative procedure act, 3 V.S.A. § 801 *et seq.* In particular, Section 815 authorizes an appeal from any final decision of an agency to the Vermont Supreme Court.

lief available in this court. Accordingly, the court finds that a plain, speedy and efficient remedy may be had in the Vermont courts.

Plaintiffs also have advanced several theories in an attempt to avert the application of the Tax Injunction Act. These theories include a private attorney general principle, and a statutory exception to the application of the Act, pursuant to 49 U.S.C. § 11503a(c). Neither of these theories is persuasive.

In summary, the court concludes that the Tax Injunction Act in the context of the record presented constitutes a jurisdictional barrier which deprives the court of jurisdiction to issue the temporary restraining order and preliminary injunctive relief sought by the plaintiffs. *Hickmann v. Wujick*, 488 F.2d 875, 876 (2d Cir. 1973). Plaintiffs' request for a temporary restraining order and preliminary injunction under Fed.R.Civ.P. 65 is denied. It is so ORDERED.

APPENDIX L

Vt. Stat. Ann. tit. 23, § 367 (Supp. 1982), *as amended by* 1981 (Adj. Sess.), No. 172, § 3 (1982) ("Act 172") reads in pertinent part as follows:

> The annual registration fee for truck-tractors and motor trucks with a gross weight of 18,000 pounds or over shall be $50.00 less than the fee computed in accordance with this subsection.

Vt. Stat. Ann. tit. 23, § 415 (Supp. 1981), *as amended by* 1981, No. 87, § 18 (1981) ("Act 87"):

> In addition to any other provision of law relating to registration of motor vehicles, or fees paid therefor, a person owing or operating a motor truck, as defined in section 420 of this title, upon the highways of the state, which is not registered in this state, shall apply to the commissioner of motor vehicles for a highway use permit for each such motor truck to be so operated. Application shall be made upon a form prescribed by such commissioner and shall set forth such information as the commissioner may require. The application shall be accompanied by a permit fee of $40.00 for each motor truck listed in the application. The commissioner shall issue a permit and an identification tag, plate or sticker for each such motor truck, which tag, plate or sticker shall be of such size and design and contain such information as the commissioner shall prescribe. Any such permit and tag, plate or sticker shall become void on October 1 next following the date of issue. Such permits shall be carried in the motor truck and the tag, plate or sticker shall be affixed to said motor truck and at all times be visible and legible. For emergency purposes, the commissioner may by telegram, identifying the motor truck, authorize its operation without the attachment of a tag, plate or sticker for a period not to exceed seven days from

the date of issue of the permit. The telegram must be kept with the truck while being so operated.

The commissioner may issue a single trip permit, authorizing operation for one trip into the state of Vermont without the attachment of a tag, plate or sticker for a period not to exceed seven days from the date of issue of the permit. Single trip authorization must be kept with the truck while being so operated. The total cost of the permit and trip shall be $40.00 payable in advance.

Vt. Stat. Ann. tit. 23, § 415 (Supp. 1982), *as amended by* Act 172:

(a) In addition to any other provision of law relating to registration of motor trucks with a gross weight of 18,000 pounds or over and powered by gasoline or any other non-diesel fuel, or fees paid therefor, a person owning or operating a motor truck upon the highways of the state, whether or not registered in this state, shall apply to the commissioner of motor vehicles for a non-diesel fuel user's license for each such motor truck to be so operated. Application shall be made upon a form prescribed by such commissioner and shall set forth such information as the commissioner may require. The application shall be accompanied by a license fee of $50.00 for each motor truck listed in the application. The commissioner shall issue a license and an identification tag, plate or sticker for each such motor truck, which tag, plate or sticker shall be of such size and design and contain such information as the commissioner shall prescribe. Except as otherwise provided, any such license and tag, plate or sticker shall become void on October 1 next following the date of issue. Such licenses shall be carried in the motor truck and the tag, place or sticker shall be affixed to said motor truck and at all times be visible and legible. For emergency purposes, the commissioner may by tele-

gram, identifying the motor truck, authorize its operation without the attachment of a tag, plate or sticker for a period not to exceed twenty-one days from the date of issue of the license. The telegram must be kept with the truck while being so operated. This section shall not apply to motor trucks owned by federal, state, provincial or municipal governments.

(b) A person owning or operating a motor truck as defined in subsection (a) of this section which is registered in this state and for which the fees required under section 367 have been paid, shall not be required to obtain the license or pay the fee as required in subsection (a) until his next registration renewal and annually thereafter.

(c) The commissioner may issue a single trip license authorizing operation for the trip into the state of Vermont without the attachment of a tag, plate or sticker for a period not to exceed seven days from the date of issue of the license. Single trip authorization must be kept with the truck while being so operated. The total cost of the license shall be $50.00 payable in advance.

Vt. Stat. Ann. tit. 23, § 415, *as amended by* 1985 (Adj. Sess.), No. 124, § 10 (1986) ("Act 124"):

(a) In addition to any other provision of law relating to registration of motor trucks with a gross weight of 18,000 pounds or over and powered by gasoline or any other non-diesel fuel, or fees paid therefor, a person owning or operating a motor truck upon the highways of the state, whether or not registered in this state, shall apply to the commissioner of motor vehicles for a non-diesel fuel user's license for each such motor truck to be so operated. Application sall be made upon a form prescribed by such commissioner and shall set forth such informa-

tion as the commissioner may require. The application shall be accompanied by a license fee of $50.00 for each motor truck listed in the application. The commissioner shall issue a license and an identification tag, plate or sticker for each such motor truck, which tag, plate or sticker shall be of such size and design and contain such information as the commissioner shall prescribe. Except as otherwise provided, any such license and tag, plate or sticker shall become void on January 1 next following the date of issue. Such licenses shall be carried in the motor truck and the tag, plate or sticker shall be affixed to said motor truck and at all times be visible and legible. For emergency purposes, the commissioner may by telegram, identifying the motor truck, authorize its operation without the attachment of a tag, plate or sticker for a period not to exceed twenty-one days from the date of issue of the license. The telegram must be kept with the truck while being so operated. This section shall not apply to motor trucks owned by federal, state, provincial or municipal governments.

(b) A person owning or operating a motor truck as defined in subsection (a) of this section which is registered in this state and for which the fees required under section 367 have been paid, shall not be required to obtain the license or pay the fee as required in subsection (a) until his next registration renewal and annually thereafter.

Vt. Stat. Ann. tit. 23, § 415a (Supp. 1981), *as amended by* Act 87:

The commissioner may issue a single trip permit, authorizing operation for one trip into the state of Vermont without the attachment of a tag, plate or sticker for a period not to exceed seven days from the date of issue of the permit. Single trip authorization must be kept with the truck while being so

operated. The total cost of the permit and trip shall be $40.00 payable in advance.

Vt. Stat. Ann. tit. 23, § 417 (Supp. 1981), *as amended by* Act 87:

(a) In addition to the foreign truck registration provided by sections 415-421 of this title, a person operating a motor truck on the highways of this state, which truck is registered in another state or province, shall pay a fee of $15.00 for each entry into the state. If more than one tax, fee or toll is imposed upon vehicle usage in another state, then there shall be charged an additional $10.00 for each entry into this state of any truck registered in the state charging the additional tax, fee or toll.

(b) In the event that a person so operates a motor truck on the highways of this state and fails to report that operation in accordance with regulations promulgated by the commissioner, the person shall pay a fee of $40.00 for each unreported entry into the state. The payment of the fee shall not preclude the imposition of penalties provided for in section 421 of this title.

Vt. Stat. Ann. tit. 23, § 417 (Supp. 1982), *as amended by* Act 172:

(a) If a ton-mile tax, or a tax requiring quarterly or monthly reporting is imposed on Vermont registered vehicles by another state in addition to that state's diesel fuel tax, then there shall be charged an additional $10.00 for each entry into this state of any truck registered in the state charging the additional tax, fee or toll.

(b) In the event that a person so operates a motor truck on the highways of this state and fails to report that operation in accordance with regulations

promulgated by the commissioner, the person shall pay a fee of $40.00 for each unreported entry into the state. The payment of the fee shall not preclude the imposition of penalties provided for in section 421 of this title.

Vt. Stat. Ann. tit. 23, § 421 (Supp. 1985):

(a) It shall be unlawful for any person:

(1) to operate a motor truck subject to the provisions of this chapter upon any public highway in the state without first obtaining the license, emergency telegram or single trip license and tag, plate or marker required under section 415 of this title or to so operate without carrying the license, emergency telegram or single trip license and displaying the tag, plate or marker if issued; or

(2) to violate any regulation issued by the commissioner pursuant to the authority granted hereunder; or

(3) to fail to file any return or report required by said commissioner;

(4) to make a false return or fail to keep records of operations as may be required by the commissioner; or

(5) to operate a motor bus subject to the provisions of this chapter upon any public highway in the state without first obtaining the marker or single trip permit required under section 422 of this title or to so operate without displaying said marker or without the single trip permit with the vehicle.

(b) Any person who violates any provision of subsection (a), upon first conviction shall be punishable by a fine of not less than $100.00 or more than $250.00; and upon a second or subsequent conviction of a violation occurring within one year after a

previous conviction of any provision of subsection (a) by a fine of not less than $250.00 or more than $500.00, or by imprisonment for not more than thirty days, or both.

Vt. Stat. Ann. tit. 23, § 3007 (Supp. 1982), *as amended by* Act 172:

(a) In addition to any other provision of law relating to registration of motor vehicles, or fees paid therefor, a person owning or operating upon the highways of the state a motor truck, which is registered in the state, using fuel as defined in section 3002, shall, for each motor truck to be so operated, apply to the commissioner of motor vehicles on or before July 1, 1982 for a diesel fuel user license, which shall be renewed at the time of renewal of the truck's registration. Application shall be made upon a form prescribed by such commissioner and shall set forth such information as the commissioner may require. Only applications filed at the time of the initial registration or renewal of a registration shall be accompanied by a $50.00 annual license fee for each motor truck listed in the application except that no fee shall be required for motor trucks with a gross weight of less than 18,000 pounds.

(b) In addition to any other provision of law relating to registration of motor vehicles, or fees paid therefor, a person owning or operating upon the highways of the state a motor truck using fuel, which is not registered in this state, shall apply to the commissioner of motor vehicles on or before December 1, 1982 for a diesel fuel user license for each such motor truck to be so operated. Application shall be made upon a form prescribed by such commissioner and shall set forth such information as the commissioner may require. Except for motor trucks

with a gross weight of less than 18,000 pounds, and vehicles licensed prior to December 1, 1982 under section 415, the application for issuance of initial and renewal licenses shall be accompanied by a $50.00 license fee for each motor truck listed in the application. The commissioner shall issue a license and an identification tag, plate or sticker for each such motor truck which tag, plate or sticker shall be of such size and design and contain such information as the commissioner shall prescribe. Any such license and tag, plate or sticker shall become void on October 1, 1983 and each October 1 thereafter. Such licenses shall be carried in the motor vehicle and the tag, plate or sticker shall be affixed to said motor vehicle and at all times be visible and legible. For emergency purposes, the commisisoner may by telegram, identifying the motor vehicle, authorize its operation without the attachment of a tag, plate or sticker for a period not to exceed twenty-one days from the date of issue of the license. The telegram must be kept with the vehicle while being so operated.

(c) A person owning or operating a motor bus upon the highways of the state, which is not registered in this state, shall apply to the commissioner of motor vehicles for an identification marker as provided by section 422 of this title which shall be conspicuously displayed on the motor bus while operated within the state. The owner or operator shall be required to file a report under the provisions of section 3014 and pay the tax imposed by section 3003 under the provisions of section 3015.

(d) This section shall not apply to users obtaining trip permits under section 3010 or 422(b) or to users' vehicles exempt from reporting requirements under section 3014 or to users' vehicles exempt from taxation under subdivisions 3003(d)(3) and (5).

Vt. Stat. Ann. tit. 23, § 3007, *as amended by* Act 124:

(a) In addiiton to any other provision of law relating to registration of motor vehicles, or fees paid therefor, a person owning or operating upon the highways of the state a motor truck, which is registered in the state, using fuel as defined in section 3002, shall, for each motor truck to be so operated, apply to the commissioner of motor vehicles for a diesel fuel user license, which shall be renewed at the time of renewal of the truck's registration. Application shall be made upon a form prescribed by such commissioner and shall set forth such information as the commissioner may require. Applications filed at the time of the initial registration or renewal of a registration shall be accompanied by a $50.00 annual license fee for each motor truck listed in the application except that no fee shall be required for motor trucks with a gross weight of less than 18,000 pounds.

(b) In addition to any other provision of law relating to registration of motor vehicles, or fees paid therefor, a person owning or operating upon the highways of the state a motor truck using fuel, shall apply to the commissioner of motor vehicles for a diesel fuel user license for each such motor truck to be so operated. Application shall be made upon a form prescribed by such commissioner and shall set forth such information as the commissioner may require. Except for motor trucks with a gross weight of less than 18,000 pounds, and vehicles licensed under section 415, the application for issuance of initial and renewal licenses shall be accompanied by a $50.00 license fee for each motor truck listed in the application. The commisisoner shall issue a license and an identification tag, plate or sticker for each such motor truck which tag, plate

or sticker shall be of such size and design and contain such information as the commissioner shall prescribe. Any such license and tag, plate or sticker shall become vaid on each January 1 thereafter. Such licenses shall be carried in the motor vehicle and the tag, plate or sticker shall be affixed to said motor vehicle and at all times be visible and legible. For emergency purposes, the commissioner may by telegram, identifying the motor vehicle, authorize its operation without the attachment of a tag, plate or sticker for a period not to exceed twenty-one days from the date of issue of the license. The telegram must be kept with the vehicle while being so operated.

(c) A person owning or operating a motor bus upon the highways of the state, which is not registered in this state, shall apply to the commissioner of motor vehicles for an identification marker as provided by section 422 of this title which shall be conspicuously displayed on the motor bus while operating within the state. The owner or operator shall be required to file a report under the provisions of section 3014 and pay the tax imposed by section 3003 under the provisions of section 3015.

(d) This section shall not apply to users obtaining trip permits under section 422(b) or to users' vehicles exempt from reporting requirements under section 3014 or to users' vehicles exempt from taxation under subdivisions 3003(d)(3) and (5).

Vt. Stat. Ann. tit. 23, § 3010 (Supp. 1982), *as amended by* Act 172:

(a) An unlicensed user may obtain a single trip permit which shall be good for one motor truck for a period not to exceed seven consecutive days beginning and ending on the dates specified on the face of the permit. The fee for the permit for motor

trucks with a gross weight of 18,000 pounds or over shall be $50.00. Fees for trip permits shall be in lieu of the tax otherwise payable by a user and no report under the provisions of section 3014 shall be required with respect to such motor vehicles. Single trip authorizations shall be kept with the vehicle while so being operated.

(b) Whenever the commissioner is satisfied that unforseen or uncertain circumstances have arisen which requires a user to operate in this state a motor truck for which no identification marker has been obtained, and if the commissioner is satisfied that prohibition of such operation would cause undue hardship, he may provide the user with temporary authorization for the operation of such motor truck pending payment of the license fee as required by section 3007(b). The fee for the temporary authorization for motor trucks with a gross weight of 18,000 pounds or over shall be $50.00, and shall also constitute payment of the license fee required under section 3007 (b). Temporary authorizations shall be kept with the vehicle while being operated and shall authorize its operation without the attachment of a tag, plate or sticker for a period not to exceed 21 days from the date of issue of the license.

Vt. Stat. Ann. tit. 23, § 3010, *as amended by* Act 124:

Whenever the commissioner is satisfied that unforeseen or uncertain circumstances have arisen which require a user to operate in this state a motor truck for which no identification marker has been obtained, and if the commissioner is satisfied that prohibition of such operation would cause undue hardship, he may provide the user with temporary authorization for the operation of such motor truck pending payment of the license fee as required by

section 3007(b). The fee for the temporary authorization for motor trucks with a gross weight of 18,000 pounds or over shall be $50.00, and shall also constitute payment of the license fee required under section 3007(b). Temporary authorizations shall be kept with the vehicle while being operated and shall authorize its operation without the attachment of a tag, plate or sticker for a period not to exceed 21 days from the date of issue of the license.

Vt. Stat. Ann. tit. 23, § 3020(b) (Supp. 1985):

(b) If the commissioner determines that a tax, penalty, interest or fee required by this chapter has been paid more than once by a licensee, or has been illegally or erroneously collected or computed, the excess amount paid or collected shall be credited to the tax account of the licensee, and the licensee shall be notified thereof by mail. Any balance of the excess amount remaining in the licensee's account after crediting the overpayment shall be refunded if requested within 30 days of the date of mailing notice.

Vt. Stat. Ann. tit. 23, § 3024 (Supp. 1985):

(a) Any person under this chapter who shall willfully: fail or refuse to pay the tax imposed or engage in any activity for which a license is required without having procured and maintained such license; fail to make any of the reports required; make any false statement in any application, report or statement required; refuse to permit the commissioner or any deputy to make the examination as provided by section 3013(c) of this title; fail to keep proper records of quantities of fuel received, sold, used or delivered in this state as required; make any false statement on any delivery ticket or invoice as to the quantity of fuel delivered, sold or used; make any false statement in connection with a report or an application for the refund of any monies or taxes; or

engage in any act or activity with the intent to evade payment to or prevent collection by the state of the tax imposed, shall be, in addition to any other penalties herein or elsewhere prescribed, guilty of a misdemeanor punishable by a fine of not more than $5,000.00 or imprisonment for not more than one year or both.

(b) It shall be unlawful for any person:

(1) to operate a motor vehicle subject to the provisions of this chapter upon any public highway in the state without first obtaining the diesel fuel users license and marker required under section 3007 of this title or to so operate without displaying said marker or to so operate without having in the vehicle either the license or telegram issued under section 3007 or a permit issued under section 3010 of this title;

(2) to violate any regulation issued by the commissioner pursuant to the authority granted hereunder; or

(3) to operate a motor truck without maintaining the log required by section 3025 of this title.

(c) Any person who violates any provision of subsection (b) shall be fined not more than $2,000.00 or not less than $500.00. Such penalty shall be in addition to the penalty imposed by any other section of this chapter.

Vt. Stat. Ann. tit. 23, § 328 (Supp. 1985):

Upon application of the commissioner, the finance director shall issue his warrant in favor of any person equitably entitled to a refund of money erroneously paid into the state treasury for the registration of a motor vehicle, trailer, semi-trailer or license. A refund shall not be allowed except as provided in this section and sections 325-327 of this title.

Supreme Court, U.S.
FILED
SEP 11 1986
JOSEPH F. SPANIOL, JR.
CLERK

No. 86-69

In the Supreme Court of the United States

OCTOBER TERM, 1986

AMERICAN TRUCKING ASSOCIATIONS, INC., *et al.*,
Petitioners

v.

WILLIAM CONWAY,
COMMISSIONER OF MOTOR VEHICLES,
STATE OF VERMONT, *et al.*,
Respondents

On Petition for a Writ of Certiorari to the Supreme Court of Vermont

SUPPLEMENTAL MEMORANDUM FOR THE PETITIONERS

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SUPPLEMENTAL MEMORANDUM FOR THE PETITIONERS

Petitioners submit this supplemental memorandum, pursuant to Rule 22.6 of the Rules of this Court, to call the Court's attention to the recent decision of the Supreme Court of New Hampshire in *Private Truck Council of America, Inc.* v. *New Hampshire*, No. 86-088 (Aug. 12, 1986).[1]

The issue in *Private Truck Council* was whether a New Hampshire statute imposing highway use permit taxes only on certain out-of-state trucks violated the Commerce Clause of the United States Constitution. The Supreme Court of New Hampshire held the statute unconstitutional. As a remedy, the court

[1] The opinion of the Supreme Court of New Hampshire is reprinted as an Appendix to this supplemental memorandum.

ordered a refund of taxes collected subsequent to the filing of the suit (which had been placed in an escrow account), but it declined to order a refund of taxes paid without protest prior to the date the suit was brought. It is clear from the New Hampshire court's reasoning that it would have ordered the refund that the Supreme Court of Vermont refused to allow.

The Supreme Court of New Hampshire recognized that taxpayers are entitled to a refund of taxes unconstitutionally collected, even in the absence of statutory refund authority, if the taxpayers "prove that they paid the tax involuntarily" (App., *infra*, 9a, *citing Ward* v. *Love County*, 253 U.S. 17, 22 (1920)). The court explained that sovereign immunity would not bar such a refund claim "when the State has been given fair notice that the taxpayer protested payment of the tax" (App., *infra*, 9a). The court also recognized that a tax is paid involuntarily if a taxpayer's "only choices [had] been either payment of tax or submitting to the penalties imposed upon conviction of a misdemeanor" (*id.* at 10a). Because the plaintiffs in *Private Truck Council* had other choices available—*i.e.*, they "could have filed a declaratory judgment action * * * or notified the State that they were paying the taxes 'under protest'" (*ibid.*)—the court concluded that "[f]airness requires that we disallow recovery of those funds [paid prior to the time] fair notice was given to the State" (*id.* at 11a). All taxes paid after giving such notice, however, were held to be fully refundable.[2]

In the instant case, petitioners plainly notified the State of Vermont that they were paying all of the

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[2] Petitioners do not necessarily agree that the New Hampshire Supreme Court correctly denied a refund of taxes paid prior to the filing of suit.

taxes at issue under protest. As discussed in the Petition (at 3, 6), petitioners filed class actions challenging the constitutionality of the taxes *before* the taxes went into effect, and they were denied preliminary injunctive relief on the assumption that a refund would be available (see Pet. 4). Compare App., *infra*, 11a ("in this case, the plaintiffs gave the State fair notice on the date that they brought this action [two years after the taxes went into effect]"). Moreover, as discussed in the Petition (at 19-20), petitioners unquestionably paid the Vermont taxes involuntarily, because a failure to pay would have subjected them to fines and criminal penalties.

Thus, the Supreme Court of Vermont denied petitioners a refund of unconstitutionally exacted taxes in precisely those circumstances in which the Supreme Court of New Hampshire announced that a refund must be made available. This conflict provides additional support for granting the petition for certiorari.

Respectfully submitted.

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SEPTEMBER 1986

APPENDIX

APPENDIX

THE SUPREME COURT OF NEW HAMPSHIRE

Hillsborough

No. 86-088

PRIVATE TRUCK COUNCIL OF AMERICA, INC. *& a.*

v.

THE STATE OF NEW HAMPSHIRE *& a.*

August 12, 1986

JOHNSON, J. In this interlocutory transfer without ruling, the plaintiffs challenge the constitutionality of former RSA 260:53 (*repealed by* Laws 1985, 383:2, effective July 1, 1985) in an action by and on behalf of various out-of-state motor carriers. The plaintiffs contend that the statute violated both the commerce clause and the privileges and immunities clause of the United States Constitution because it discriminated against out-of-state businesses by imposing highway use permit fees on certain foreign-registered motor vehicles. The plaintiffs seek refunds of all taxes imposed pursuant to RSA 260:53, attorney's fees, and injunctive relief. We hold that the provisions of former RSA 260:53 violated the commerce clause, but that the plaintiffs are entitled only to refunds of taxes paid that are contained in an escrow fund established in the course of this litigation.

From December 31, 1982, until July 1, 1985, pursuant to former RSA 260:53, taxes and fees were imposed on motor carriers whose vehicles were registered in nine other states: Colorado, Nevada, New Mexico, New York, Ohio, Oregon, Pennsylvania, Vermont, and Wyoming. *See* N.H. Admin. Rules, Saf-M 307.07, 308.01. These highway use permit fees were imposed on vehicles registered in states that imposed "third structure taxes" on motor carriers, including those registered in New Hampshire, which New Hampshire does not impose. "Third structure taxes" are taxes assessed in addition to registration and fuel taxes. Vermont carriers were required to pay a $50 annual fee for each motor truck or tractor trailer unit, and a $25 annual fee for each motor bus fleet plus $2 per bus or, alternatively, to purchase temporary authorizations good for seven days at $50 per motor truck and tractor trailer unit and $15 for motor buses. *See* N.H. Admin. Rules, Saf-M 307.07, 307.22, 307.01. Carriers operating vehicles registered in the remaining eight states were required to purchase highway use permits at $120 or, alternatively, temporary authorizations good for three days at $10 per vehicle. *See* N.H. Admin. Rules, Saf-M 308.01, 302.06.

The plaintiffs, Private Truck Council and two out-of-state motor carriers, filed a bill in equity on December 27, 1984. On January 10, 1985, the parties filed and the Superior Court (*Dalianis*, J.) approved an agreement to hold in escrow all of the taxes collected pursuant to former RSA 260:53 by carriers in eight of the states. In March 1985, the agreement was amended to include taxes paid by Vermont carriers. Taxes paid by the plaintiffs between December 31, 1982, and the establishment of the escrow fund were not held in escrow. Effective July 1, 1985, the tax was repealed. Laws 1985, 383:2.

In a pretrial ageement, the parties agreed that the court "should certify as a plaintiff class all motor car-

riers whose vehicles are registered in states against which New Hampshire retaliates." The court "approved" the agreement in an order dated March 26, 1985. The court's order met none of the formal requirements of Superior Court Rule 27-A, however, and hence we do not regard the plaintiffs as having been certified as a class.

On September 6, 1985, the plaintiffs moved for summary judgment and then on December 7, 1985, moved for interlocutory transfer without ruling. The transfer was approved on February 19, 1986, and on April 23, 1986, we accepted the transfer to resolve the questions of law presented in the plaintiffs' summary judgment motion. The transferred questions are as follows:

> "1. Whether it is required to be held, as a matter of law without the necessity of any factual hearing, that [RSA 260:53] discriminated against interstate commerce during the period it was in effect in violation of the Commerce Clause and Privileges and Immunities Clause of the United States Constitution because, as defendants have admitted, the 'retaliatory' taxes and fees imposed by that section applied only to motor carriers operating in New Hampshire whose vehicles were registered in nine other States and did not apply to carriers whose vehicles were registered in New Hampshire . . . ;
>
> "2. Whether [RSA 260:50], the Road Toll Refund Statute, applies to refunds of the retaliatory taxes involved in this case . . .; [and]
>
> "3. Whether plaintiffs are also entitled to refunds under the equitable principles of restitution and unjust enrichment, and whether a 'passing-on' defense may be asserted to bar such refunds . . . ."

(Footnote omitted.) We consider these questions in turn.

I. *Constitutionality of Former RSA 260:53*

The plaintiffs contend that former RSA 260:53 violated the commerce clause of the United States Constitution, art. I, § 8, cl. 3, because it discriminated against interstate commerce and because the taxes it authorized were not fairly related to services provided to out-of-state vehicles by New Hampshire. The fundamental principle underlying the commerce clause as it relates to taxation is that "[n]o State . . . may 'impose a tax which discriminates against interstate commerce . . . by providing a direct commercial advantage to local business.'" *Boston Stock Exchange v. State Tax Comm'n*, 429 U.S. 318, 329 (1977). An analysis under the commerce clause must balance "the national interest in free and open trade and the legitimate interest of the individual States in exercising their taxing powers." *Id.*

The United States Supreme Court has set forth a four-part test which a tax must meet if it is to survive an analysis under the commerce clause. The tax must have a substantial nexus with the State, must be fairly apportioned, must not discriminate against interstate commerce, and must not be unrelated to services provided by the State. *Maryland v. Louisiana*, 451 U.S. 725, 754 (1981). Plaintiffs in this case assert that the taxes imposed by former RSA 260:53 must fail under the latter two prongs of the test.

We first address the defendants' contention that the constitutionality of former RSA 260:53 cannot be decided without further factual findings concerning the actual effect of the tax on interstate commerce, including findings on the cost per mile borne by out-of-state as opposed to in-state vehicles, and the amount of taxes used to pay for the upkeep of New Hampshire roads and the enforcement of other motor vehicle statutes. Moreover, the defendants claim that the plaintiffs must prove that they, and not their customers, bore the economic burden

of the tax. *See Cagan's, Inc. v. Dep't of Rev. Admin.*, 128 N.H. ——, —— A.2d —— (decided June 5, 1986).

A factual record delineating the greater burden on out-of-state vehicles is necessary only if the statute does not discriminate on its face. *Cf. Interstate Busses Corp. v. Blodgett*, 276 U.S. 245, 251 (1928); *American Trucking Associations, Inc. v. Quinn*, 437 A.2d 623, 626 (Me. 1981). The statute challenged here imposes taxes on foreign-registered vehicles that are not imposed on New Hampshire-registered vehicles, and therefore we conclude that the statute discriminates on its face against interstate commerce. *Cf. Private Truck Council v. Secretary of State*, 503 A.2d 214, 217 (Me.), *cert. denied*, 106 S. Ct. 1997 (1986); *American Trucking Ass'ns, Inc. v. Conway*, 508 A.2d 405, 407 (Vt. 1986). *But see American Trucking Associations, Inc. v. Scheiner*, 509 A.2d 838 (Pa. 1986). Knowledge of the *amount* of discrimination imposed by a statute is not necessary to decide that it discriminates. "We need not know how unequal the tax is before concluding that it unconstitutionally discriminates." *Maryland v. Louisiana*, *supra* at 760. Furthermore, evidence of economic burden is unnecessary in this case to enable us to decide whether a right to recover a refund exists because our holding makes it unnecessary to reach that issue.

We must examine the tax in light of its actual effect when considered with the State's entire taxation scheme. *Maryland v. Louisiana*, 451 U.S. at 756. Although we have concluded that the tax on its face is discriminatory, the statute may nevertheless pass constitutional muster if it is compensatory. *See id.* at 758. The concept of a compensatory tax "first requires identification of the burden for which the State is attempting to compensate." *Id.* The defendants appear to argue that New Hampshire's registration fees are the taxes for which former RSA 260:53 attempted to compensate. Registration fees for resident vehicles cannot be compensated for by taxes

imposed against out-of-state vehicles because all vehicles pay registration fees in their own states, which entitle them to operate in all states with registration reciprocity. *American Trucking Associations, Inc. v. Quinn*, *supra* at 626-27; *American Trucking Ass'ns, Inc. v. Conway*, *supra* at 407. New Hampshire's acceptance of registration reciprocity, *see* RSA 261:44, constituted a waiver of its right to impose registration fees on foreign-registered vehicles. The retaliatory taxes at issue here therefore cannot be regarded as compensatory.

Furthermore, the legislature's evident purpose in enacting former RSA 260:53 was to provide an incentive for states to repeal third structure taxes that are not imposed by New Hampshire. The imposition of a "retaliatory" tax of this nature, however, is not a legitimate means by which to alleviate another state's alleged burden on interstate commerce. If another state is unconstitutionally burdening interstate commerce, the remedy is an action under the commerce clause. *See A & P Tea Co. v. Cottrell*, 424 U.S. 366, 379-80 (1976). A state may not seek to correct discrimination in interstate commerce by retaliating against its source; "to prevent this was one of the chief ends sought to be accomplished by the adoption of the Constitution." *Travis v. Yale & Towne Mfg. Co.*, 252 U.S. 60, 82 (1920).

We hold that former RSA 260:53 discriminated against interstate commerce and, therefore, that the plaintiffs' challenge to the constitutionality of the statute under the commerce clause must be upheld. Although we otherwise need not reach the issue of whether the statute also violated the privileges and immunities clause of the United States Constitution, we will consider the plaintiffs' argument in light of their refund claim under 42 U.S.C. § 1983 (1982).

The privileges and immunities clause provides that "[t]he Citizens of each State shall be entitled to all Priv-

ileges and Immunities of Citizens in the several States." U.S. CONST. art. IV, § 2, cl. 1. It is well-settled that corporations are not citizens within the meaning of the privileges and immunities clause. *Paul v. Virginia*, 75 U.S. (8 Wall.) 168, 177 (1869), *overruled on other grounds, United States v. Underwriters Assn.*, 322 U.S. 533 (1944); *see also Western & Southern L. I. Co. v. Bd. of Equalization*, 451 U.S. 648, 656 (1981). The plaintiffs in this case are two corporations and one incorporated association representing numerous companies acting as private carriers. The privileges and immunities clause applies only to natural persons and, therefore, the plaintiffs cannot invoke its protection. *See Hemphill v. Orloff*, 277 U.S. 537, 550 (1928); *American Trucking Associations, Inc. v. Larson*, 683 F.2d 787, 790 (3d Cir.), *cert. denied*, 459 U.S. 1036 (1982).

II. *Refunds*

The escrow agreement of the parties provides that the "escrow will provide a ready fund from which refunds can easily be paid . . . ." In that the agreement does not state the effective date of the establishment of the escrow fund, but does state that the fund will "facilitate refunds of the fees collected during the pendency of this case," we read the agreement to provide that taxes paid since the plaintiffs brought their action will be held in escrow. The defendants do not contest that taxes paid by the plaintiffs between the time that the escrow fund was established and July 1, 1985 are recoverable by the plaintiffs.

The plaintiffs assert that they are also entitled to recover nearly three million dollars in taxes paid between December 31, 1982, and the date that the escrow fund was established. The plaintiffs base their claims to refunds on three alternative grounds: (1) RSA 260:50, "Refunds of Tolls Erroneously or Illegally Collected;" (2) a common law right to refunds based on principles

of restitution and unjust enrichment; and (3) 42 U.S.C. § 1983 (1982), which creates a remedy for violations of constitutional rights under color of state law. The plaintiffs also claim entitlement to attorney's fees, either under 42 U.S.C. § 1988 (1982), or under a common law right to recover from a common fund in a class action. We hold that the plaintiffs are not entitled to refunds under any of these theories, and are not entitled to attorney's fees. We consider each theory in turn.

A. *Statutory Right to Refunds*

RSA 260:50, I, states:

> "If the director decides that any road tolls or interest or penalties have been erroneously or illegally collected from any distributor, such distributor shall be entitled to a refund thereof . . . ."

The plaintiffs conclude that because taxes have been collected from them pursuant to an unconstitutional statute, former RSA 260:53, they are entitled to refunds under the above refund statute. We disagree.

The starting point for determining legislative intent is the language of the statute itself. *State Employees' Ass'n of N.H. v. Bd. of Trustees*, 120 N.H. 272, 273, 415 A.2d 665, 666 (1980). RSA 259:21 defines "distributor" as

> "any person, wherever resident or located, who imports or causes to be imported fuel or motor fuel into the state, and also any person who refines, distills, prepares, blends, manufactures or compounds fuels within this state."

This language clearly indicates that the refund statute applies only to road tolls collected from distributors of motor fuel, and not to taxes collected from carriers.

The plaintiffs contend that "it would be plainly unreasonable" to limit refunds of road tolls collected under

RSA chapter 260 to distributors of motor fuel because, at the time RSA 260:50 was enacted, the only road tolls collected under RSA chapter 260 were motor fuel taxes. Although we have stated that we will not give force to the "literal meaning" of particular words in a statute if such meaning is inconsistent with the statute's general purpose or a well-settled rule of law, *see Blais v. Town of Goffstown*, 119 N.H. 613, 616, 406 A.2d 295, 297 (1979), we perceive no such inconsistency here. Plain and unambiguous language in a statute does not require us to look beyond the statute itself for indications of legislative intent, particularly where the result does not conflict with any statutory purpose.

B. *Common Law Right to Refunds*

The plaintiffs next assert a right to refunds under equitable principles of restitution and unjust enrichment. The defendants argue that (1) the plaintiffs must prove that they, as opposed to their customers, actually bore the economic burden of the tax; (2) a common law theory of recovery requires the plaintiffs to prove that the taxes were paid involuntarily; and (3) sovereign immunity bars a common law action for refunds against the State.

In order to recover under a common law refund theory, the plaintiffs must prove that they paid the tax involuntarily, *see Ward v. Love County*, 253 U.S. 17, 22 (1920), and we find that this has not been demonstrated. We thus need not reach the issue whether parties seeking to recover refunds in these circumstances must prove that they bore the economic burden of the tax. Further, we do not reach the question of sovereign immunity, although we note that policy considerations inherent in the doctrine require that sovereign immunity not bar a common law claim for refunds when the State has been given fair notice that the taxpayer protested payment of the tax. Likewise, we hold today that policy considerations under

the common law require that the State be given fair warning of a taxpayer's protest.

The plaintiffs urge us to accept the "implied duress" doctrine, which holds that tax payments are deemed paid involuntarily when failure to pay would have subjected the taxpayer to criminal penalties. The doctrine is based on the concept that the penalty exacted for nonpayment of a tax may be so severe that it constitutes coercion and duress. *Broward County v. Mattel*, 397 So. 2d 457, 460 (Fla. Dist. Ct. App. 1981). In this case, failure to comply with former RSA 260:53 constituted a misdemeanor. Penalties imposed upon persons convicted of misdemeanors include imprisonment for up to one year, and payment of a fine of up to one thousand dollars for an individual and up to ten thousand dollars for a corporation. RSA 651:2, II, IV.

We would have no trouble accepting the plaintiffs' argument had the plaintiffs' only choices been either payment of the tax or submitting to the penalties imposed upon conviction of a misdemeanor. Simple alternatives, however, were open to the plaintiffs. At the time that the tax was initially imposed, the plaintiffs could have filed a declaratory judgment action, RSA 491:22, or notified the State that they were paying the taxes "under protest." *Cf. Matthews v. Rodgers*, 284 U.S. 521, 526-27 (1932).

We believe that policy considerations militate against adoption of an "implied duress" doctrine broad enough to ground relief in this case. The sovereign's power to tax rests on the understanding that the funds are used for the public. In order effectively to serve the public, the State must be able to allocate revenues collected under its tax laws without the risk of liability to taxpayers who comply with the laws without protest and later demand refunds. The plaintiffs contend that the State in this case could not have relied on the revenues from taxes

collected pursuant to former RSA 260:53 because the statute's sole purpose was to induce other states to eliminate third structure taxes. Once these taxes were eliminated, the plaintiffs point out, New Hampshire's revenue from those states' carriers would have disappeared. Although we agree that the State may have hoped that it would gain no revenues from former RSA 260:53 because other states would repeal their third structure taxes, the State nevertheless did collect taxes from the plaintiffs and used those funds for the public good. Fairness requires that we disallow recovery of those funds unless fair notice was given to the State; in this case, the plaintiffs gave the State fair notice on the date that they brought this action, which corresponds to the effective date of the establishment of the escrow fund.

C. *42 U.S.C. § 1983*

The plaintiffs' final theory underlying their refund claim is based on 42 U.S.C. § 1983 (1982), which provides:

> "Every person who, under color of any statute . . . of any State . . . , subjects, or causes to be subjected, any . . . person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

The purposes underlying the original enactment of section 1983 were to override discriminatory state laws, to provide a remedy where state law was inadequate, and to provide a federal remedy where the state remedy, although adequate in theory, was unavailable in practice. *Monroe v. Pape*, 365 U.S. 167, 173-74 (1961), *overruled on other grounds, Monell v. New York City Dept. of Social Services*, 436 U.S. 658 (1978). Although the

plaintiffs argue that section 1983 provides redress for "any" violation of constitutional or federal statutory rights, section 1983 has not been so construed. *See Chapman v. Houston Welfare Rights Organization*, 441 U.S. 600, 615-20 (1979) (supremacy clause violation not redressable under § 1983); *Poirier v. Hodges*, 445 F. Supp. 838, 842 (M.D. Fla. 1978) (contract clause violation not redressable under § 1983).

We do not believe that the purposes of section 1983 would be furthered by a holding that a violation of the commerce clause is redressable through an action under that statute. The United States Court of Appeals for the Eighth Circuit has held that a violation of the commerce clause is not a basis for applying section 1983. *Consol. Freightways Corp. of Del. v. Kassel*, 730 F.2d 1139 (8th Cir.), *cert. denied*, 105 S. Ct. 126 (1984); *see also Private Truck Council v. Secretary of State*, 503 A.2d at 220-22. *But see Kennecott Corp. v. Smith*, 637 F.2d 181, 186 n.5 (3d Cir. 1980); *Confederated Salish & Kootenai Tribes v. Moe*, 392 F. Supp. 1297, 1304-05 (D. Mont. 1974), *aff'd on other grounds*, 425 U.S. 463 (1976). The Eighth Circuit based its holding on the ground that the commerce clause does not establish individual rights, but rather allocates power between State and Federal governments. *Kassel, supra* at 1144.

Both the commerce clause and the supremacy clause "limit the power of a state to interfere with areas of national concern. Just as the Supremacy Clause does not secure rights within the meaning of § 1983, neither does the Commerce Clause." *Kassel*, 730 F.2d at 1144 (footnote omitted). "The Commerce Clause created no rights or privileges; it established no law other than the law of jurisdiction to regulate those engaged in interstate or foreign commerce." *Id.* at 1145 (quoting B. Gavit, *Commerce Clause* 32-33 (1932)). The Eighth Circuit concluded that "[a]lthough individuals are oftentimes benefitted through the indirect protection resulting from the

limitations placed on the states through the dormant Commerce Clause doctrine, such benefit is not the same thing as a 'right' secured by the Constitution within the meaning of § 1983." *Id.*

We agree that a commerce clause violation is not redressable under section 1983. We therefore deny the plaintiffs' claims for refunds of taxes paid before the establishment of the escrow fund. The plaintiffs' claims for attorney's fees also must fail. The plaintiffs have not stated a cause of action under section 1983, and thus cannot recover attorney's fees under 42 U.S.C. § 1988 (1982), which provides for attorney's fees in, *inter alia*, section 1983 actions. Furthermore, the plaintiffs have not demonstrated a common law right to attorney's fees under the theory of a "common fund" for the benefit of a class because, as we have indicated, this action has not been properly certified as a class action. Moreover, the plaintiffs have not demonstrated any bad faith on the part of the State. *See Harkeem v. Adams*, 117 N.H. 687, 691, 377 A.2d 617, 619 (1977).

III. *Injunctive Relief*

Finally, the plaintiffs request injunctive relief. In view of the repeal of former RSA 260:53, the plaintiffs no longer seek an injunction against the collection of taxes under that statute. Instead, they seek an injunction against "the imposition or collection of retaliatory taxes pursuant to any authority." This request rests upon purely speculative grounds and, moreover, raises serious issues regarding the separation of powers. We are confident that the State will abide by the consequences of this decision, and we see no reason to grant the plaintiffs' request.

In summary, we hold that former RSA 260:53 violated the commerce clause by unlawfully discriminating against interstate commerce. The plaintiffs are thus en-

titled to recovery of all of the funds held in escrow. They are not entitled, however, to recovery of any taxes paid before the establishment of the escrow fund, nor do we grant their request for attorney's fees. We therefore answer question (1) in the affirmative with respect to the commerce clause, and in the negative with respect to the privileges and immunities clause, and questions (2) and (3) in the negative.

Remanded.

All concurred.

Supreme Court, U.S.
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No. 86-69

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

AMERICAN TRUCKING ASSOCIATIONS, *et al.*,
Petitioners,

v.

WILLIAM CONWAY, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the Supreme Court of Vermont

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BRIEF IN OPPOSITION

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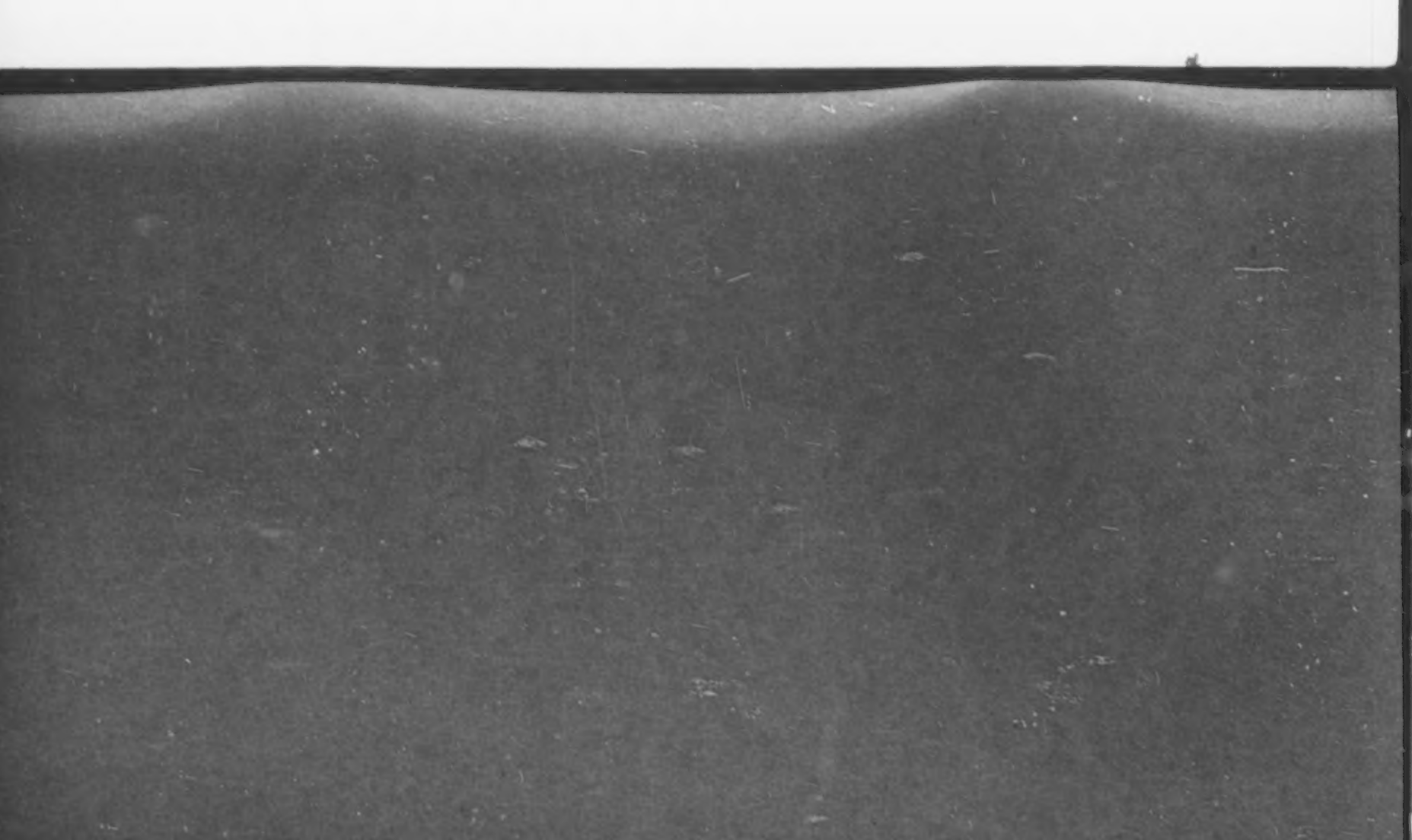

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IN THE

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OCTOBER TERM, 1986

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BRIEF IN OPPOSITION

ARGUMENT

Respondents urge that the petition for a writ of certiorari in this case be denied. As we show in part I of this brief, this Court is without jurisdiction to review this case, because the question sought to be presented here was neither raised nor decided in the state courts. As we show in part II, even were there jurisdiction, the question petitioners seek to have reviewed is not worthy of this Court's consideration, because the answer to that question is well-settled, adversely to petitioners' position, by numerous decisions of this Court.

I. THE FEDERAL QUESTION SOUGHT TO BE PRESENTED HERE WAS NEVER RAISED IN THE VERMONT COURTS OR ADDRESSED BY THOSE COURTS, AND THIS COURT ACCORDINGLY CANNOT CONSIDER IT.

In the Vermont courts, petitioners argued that they were entitled to a refund on the basis of state law. At no point did they suggest that the Federal Constitution entitled them to a refund. The Supreme Court of Vermont ruled that petitioners were *not* entitled to a refund as a matter of state law. It addressed no other question. Now petitioners seek to bring to this Court, as their sole question presented, a claim that the Federal Constitution entitled them to a refund. As petitioners never presented that claim to the Vermont courts, and those courts did not address that claim, this Court is without jurisdiction to entertain it.

We begin by setting forth the history of petitioners' quest in the Vermont courts for a refund, to establish that the issue tendered here was never presented to or addressed by those courts. We then show that in these circumstances this Court lacks jurisdiction to entertain the Petition.

A. Petitioners Never Raised the Issue Sought to Be Presented Here in the State Courts, and Those Courts Did Not Address It.

ATA I and *ATA II* were briefed to the Supreme Court of Vermont concurrently, and were decided by that Court in separate opinions on the same day. The parties briefed petitioners' claimed entitlement to a refund only in *ATA II*, and the Supreme Court of Vermont resolved that claim in *ATA II* and merely applied that ruling by reference in *ATA I*. Accordingly, we describe the proceedings in *ATA II* first. We have appended to this brief the pertinent portions of the briefs filed in the state courts, and cite thereto as "Br. Opp. App. ——."

ATA II

The complaint in *ATA II*, filed in the Superior Court of Washington County, Vermont, challenged, as violative of the Commerce Clause of the Federal Constitution, the $50 user fee enacted by the Vermont Legislature in 1982 (Act 172). The prayer for relief in the complaint sought, *inter alia:*

> (c) An order directing defendants to repay to plaintiffs and members of the plaintiff class any fees or penalties wrongfully, illegally or unconstitutionally collected from said plaintiffs by defendants pursuant to the statutes complained of herein.

The parties entered into numerous stipulations, including the following:

> 2. That in the event said Act Number 172 is finally declared to be unconstitutional and void in whole or in part, by Order of a Vermont Superior Court or any higher court having competent appeals jurisdiction thereof, any fees and penalties wrongfully or illegally obtained by the State of Vermont and its instrumentalities *and ordered to be repaid thereby* may be refunded pursuant to 23 V.S.A. 3020 as enacted by said Act Number 172, 23 V.S.A. 328 or in any other manner ordered by such Court. [Br. Opp. App. 32a-33a; emphasis added.]

On the basis of a stipulated record, the Superior Court entered a declaratory judgment that the $50 user fee violated the Commerce Clause (Pet. App. 60).

Petitioners promptly filed a Motion to Alter Judgment Order, requesting that the Order be amended to compel respondents to repay the fees and penalties that had been collected under Act 172 (Br. Opp. App. 29a). In an accompanying memorandum, petitioners argued that the State had agreed in the above-quoted stipulation to repay the fees if Act 172 were found unconstitutional (*id.* 30a-31a). Respondents opposed the motion. They argued,

inter alia, that the "stipulation does not agree that any fees or penalties *shall* be repaid, but merely sets forth a methodology by which they *could* be repaid, if so ordered by the Court" (*id.* 34a-35a; emphasis in original).

The Superior Court denied petitioners' motion (Pet. App. 31a-33a). The Court reasoned (*id.* 32a):

> [T]his is a case where an award of a monetary judgment is barred by the doctrine of sovereign immunity of the type found in *Stoneman v. Vergennes School Dist. #5*, 139 Vt. 50, 54-55 [421 A.2d 1307] (1980).

The Superior Court observed that "[a]rguably" 23 V.S.A. § 3023 would empower a court "to determine whether taxes should be refunded," but courts have only "appellate jurisdiction" under that provision to review decisions of the Commissioner of Motor Vehicles, and "there has been no decision on the Commissioner's part in this case" (*id.*).

Both sides appealed, respondents from the ruling that the user fee violated the Commerce Clause, and petitioners from the denial of a refund. Petitioners' statement of the "issue presented" respecting remedy was as follows:

> Did the Washington Superior Court err in refusing to order the Defendants to repay to Plaintiffs and members of the Plaintiff class all fees, fines or penalties collected by Defendants pursuant to the Diesel Fuel Tax Act (23 V.S.A. 415, 3007 and 3010 all as enacted or amended pursuant to Act No. 172)? [Br. Opp. App. 8a.]

Petitioners' opening brief in support of their appeal from the denial of a refund is set out in full text at Br. Opp. App. 9a-16a. As is apparent, petitioners made *no* contention that a refund was required as a matter of federal constitutional law. Their entire argument was predicated on state law grounds. They made the following points: under

Vermont law, monetary relief can be awarded in a declaratory judgment action (*id.* 9a-12a); that principle empowered the Superior Court to award such relief despite the inapplicability of 23 V.S.A. § 3023 (*id.* 13a); respondents agreed in the stipulation that if Act 172 were declared unconstitutional the taxes would be refunded (*id.* 12a); the trial court's ruling that monetary relief was barred by sovereign immunity was wrong because the court had read the Vermont Supreme Court's decision in *Stoneman* too broadly (*id.* 14a-15a); in any event sovereign immunity can be waived, and was waived here, by the Vermont legislature's inclusion of 23 V.S.A. § 3020(b) in Act 172 (*id.* 15a-16a).

Respondents' brief vigorously defended the Superior Court's ruling that the refund was barred by sovereign immunity (*id.* 21a-23a). To petitioners' argument that 23 V.S.A. § 3020(b) represented a waiver of sovereign immunity, respondents replied that petitioners, by instituting this action, had made an election of remedies and thereby "forfeited any right they may have had to get a refund under the . . . statutory scheme" (*id.* 21a). Respondents further argued that even if sovereign immunity were inapplicable, this was an equitable action and the question whether to award monetary relief was committed to the Superior Court's discretion (*id.* 18a-19a). That discretion was not abused here in denying monetary relief, because the fees collected were used for road maintenance, petitioners enjoyed the benefit of that road maintenance, and a refund order would substantially increase the state deficit (*id.* 20a).

In reply, petitioners disputed that under Vermont law abuse of discretion is the appropriate standard of review (*id.* 25a), disputed that under Vermont law the benefit they received from road maintenanee justified denying a refund (*id.* 26a-27a), suggested that an alternative means of refund was available under Vermont law that would mitigate the impact on the state deficit (*id.* 27a),

and disputed that they had made an election of remedies within the meaning of Vermont law (*id.* 27a-28a).

With the arguments thus poised, the Supreme Court of Vermont decided *ATA II*. After affirming the Superior Court's ruling that the user fee violated the Commerce Clause, the Court turned to the refund issue. The Court construed the stipulation as not conceding petitioners' entitlement to a refund (Pet. App. 10a):

> [T]he stipulation only recites possible repayment methods *should* the named courts order the refund. This stipulation has no effect until a court orders the refund of the taxes. [Emphasis in Court's opinion.]

The Court found that under well-settled Vermont decisional law it was without power to order a refund, because of the State's sovereign immunity (*id.* 10a):

> In Vermont, the State cannot be sued without its consent for injuries resulting from the exercise of functions essentially governmental in character . . . The imposition of a tax on fuel users for highway maintenance is an essential governmental activity, which could be performed only by a governmental entity.

The Court went on to explain that suits against state officers seeking a declaration as to the unconstitutionality of a state statute or an injunction against its enforcement "are not considered suits against the State for purposes of sovereign immunity" (*id.*).

> But an action to recover money which would be payable from state funds may be barred as a suit against the State . . .
>
> This distinction is grounded in the principle of sovereign immunity that the state legislature should determine the State's liability for money judgments. [*Id.* 10a-11a.]

The Court found analogous the line drawn by this Court for determining "when a suit is against a state for Eleventh Amendment purposes" (*id.* 11a).

Finally, the Court rejected the contention that the state legislature had waived the State's sovereign immunity by its enactment of 23 V.S.A. § 3023(b). The Court reasoned (*id.* 12a):

> This section has the clear purpose of redressing errors in the enforcement or implementation of the diesel fuel tax. It merely provides for a refund mechanism if errors are made in determining what tax is imposed. "Although it has been stated that 'the courts will adjudge monetary claims founded upon statute, because the Legislature has inferentially indicated an intent to provide the sums needed to make good the statutory scheme', in this case such an inference is negated by the fact that the Legislature denied funding." *Stoneman, supra*, 139 Vt. at 54, 421 A.2d at 1310 (citation omitted). Here, the Vermont legislature has not inferentially indicated its intent to provide the amounts paid to the state under a statute later declared invalid. The legislature may be presumed to rely on the receipt of tax revenues received from valid properly administered enactments. The power to levy taxes and appropriate the resulting funds is a fundamental attribute of sovereignty. That power would be sorely compromised if private citizens were able to do what the executive branch may not do—spend state funds without legislative appropriation. "Where no appropriation has been made, no action for a money judgment can be maintained." *Id.*

ATA I

The complaint in *ATA I*, also filed in the Superior Court of Washington County, challenged, as violative of the Commerce Clause of the Federal Constitution, the entry fees imposed by the 1981 Act (Act 87). Paragraph 7(c) of the complaint's Claim for Relief requested:

7. A temporary restraining order and preliminary and permanent injunction:

* * *

(c) Requiring Defendant Conway to refund to the payors the difference between the fee levels provided for in 23 V.S.A. 415, 415a and 417 prior to amendment and the amended fee levels as provided in [Act 87] . . .

A temporary restraining order was sought and denied, as described at page 4 of the Petition.

The Superior Court rejected petitioners' constitutional challenge to Act 87 and dismissed the complaint (Pet. App. 70a-79a). Petitioners appealed to the Supreme Court of Vermont. The brief on appeal addressed only the constitutionality of Act 87, and not any remedial issues. The "Conclusion" of petitioners' brief (Br. Opp. App. 38a) merely recited:

> The precise relief sought by Plaintiffs-Appellants is the reversal of the said Judgment Order, and the remand of the herein action to the Washington Superior Court for the purposes of granting to Appellants appropriate relief as requested in their complaint.

The Supreme Court of Vermont found the Superior Court's findings of fact inadequate to determine the constitutionality of Act 87, and remanded for further fact findings (Pet App. 24a-30a).

On remand, the trial court made additional findings of fact (Pet. App. 65a-69a), and on the basis thereof again upheld the constitutionality of the Act, dismissing the complaint with prejudice (*id.* 16a). Petitioners again appealed to the Supreme Court of Vermont, and briefing on that appeal took place concurrently with that in *ATA II*. While the petitioners' entitlement to a refund was briefed extensively in *ATA II*, as described above,

there was no separate briefing of that issue in *ATA I*. Petitioners' opening brief merely noted, in the Statement of Case, that the trial court in denying temporary injunctive relief had reasoned that "a methodology existed *by statute* for payment of refunds of fees paid in under the statutes attacked" (Br. Opp. App. 40a, emphasis added), and that "the monetary relief requested by the Plaintiffs is a refund to all Plaintiffs" of the fees collected (*id.* 40a). The only other reference to refund was in the Conclusion to petitioners' brief (*id.* 43a), which recited:

> The precise relief sought by the Plaintiff-Appellants is a declaration that the statutes in question are unconstitutional, the reversal of the above Judgment Order, and the remand of the herein action to the Washington Superior Court for the purposes of granting to Appellants appropriate monetary and other relief as requested in their Complaint.

The Supreme Court of Vermont reversed the Superior Court and concluded that Act 87 violated the Commerce Clause. With respect to petitioners' claim for monetary relief, the Court ruled:

> Plaintiffs' claim for monetary relief is controlled by our opinion in [*ATA II*], in which we held that sovereign immunity barred a similar claim. Accordingly, we deny this claim for monetary relief [Pet. App. 21a].

B. Because the Issue Sought to Be Presented Here Was Neither Raised Nor Addressed in the Vermont Courts, This Court Cannot Consider It.

The Petition virtually concedes what the foregoing recitation makes clear—that "petitioners did not . . . argue [in the state courts] that the Constitution requires a refund remedy for taxes collected in violation of the Commerce Clause" (Pet. 5, n.3). Most assuredly, the Petition does not contain a statement conforming to this Court's Rule 21.1(h):

> If review of the judgment of a state court is sought, the statement of the case shall also specify the stage in the proceedings, both in the court of first instance and in the appellate court, at which *the federal questions sought to be reviewed* were raised; the method or manner of raising them and the way in which they were passed upon by the court; such pertinent quotation of specific portions of the record, or summary thereof, with specific reference to the places in the record where the matter appears . . . *as will show that the federal question was timely and properly raised so as to give this Court jurisdiction to review the judgment on writ of certiorari.* [Emphasis added.]

In these circumstances, the controlling principle is as stated in *Webb v. Webb*, 451 U.S. 493, 495 (1981):

> Because this case comes to this Court from a state court, the relevant jurisdictional statute is 28 U.S.C. § 1257. As applied to the circumstances of this case, that statute requires that in the state courts petitioner have "specially set up or claimed under the Constitution . . . of . . . the United States" that right which she now seeks to have this Court enforce. 28 U.S.C. § 1257(3).

In *Webb*, the lone question presented to this Court had been argued in the state courts solely as a matter of Georgia law. 451 U.S. at 497-98. Accordingly, "the federal question was not raised below and . . . we are without jurisdiction in this case." *Id.* at 495.

> We cannot conclude on this record that petitioner raised the federal claim that she now presents to this Court at any point in the state-court proceedings. Thus, we confront in this case the same problem that arose in *Cardinale v. Louisiana*, 394 U.S. 437, 438 (1969): "Although certiorari was granted to consider this question, . . . the sole federal question argued here has never been raised, preserved, or passed upon in the state courts below." Citing a

> long history of cases, we stated there that "[t]he Court has consistently refused to decide federal constitutional issues raised here for the first time on review of state court decisions."

Webb, 451 U.S. at 498-99.

Here, as in *Webb* and *Cardinale*, where the *sole* question presented is one that was not raised or decided below the defect is *jurisdictional*.[1] Petitioners, who did not ask the Vermont Supreme Court to consider whether the Federal Constitution entitled them to a refund, now ask this Court to find that that Court committed error because it did not *sua sponte* rule that there is a federal constitutional entitlement to a refund (Pet. 17-18). It is surely ironic that the Vermont Court—which adopted the constitutional arguments petitioners *did* advance *en toto*, indeed gave petitioners far more than was their due in those respects (as we explain in our conditional cross-petition)—should be condemned by petitioners for not enforcing a federal claim that petitioners did not present to it. It would be inconsistent with basic prin-

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[1] The uncertainty expressed by this Court in *Illinois v. Gates*, 462 U.S. 213, 219-23 (1983), as to whether the Court's disinclination to reach an issue in *Gates* was jurisdictional or prudential, arose only because the petition in *Gates* presented another issue that *had* been raised below—thus vesting this Court with jurisdiction over the "judgment" below. 28 U.S.C. § 1257(3). It was in that posture that the Court in *Gates* reserved the question whether, as a jurisdictional matter, it had *power* to address other claims "not pressed or passed upon" in the state courts. That likewise was the posture in *Terminiello v. Chicago*, 337 U.S. 1 (1949) and *Vachon v. New Hampshire*, 414 U.S. 478 (1974), cited in *Gates*, 462 U.S. at 219; in *Wood v. Georgia*, 450 U.S. 261 (1981) and *Eddings v. Oklahoma*, 455 U.S. 104 (1982), cited in Justice White's concurring opinion in *Gates*, 462 U.S. at 247; and in *Heath v. Alabama*, —— U.S. ——, 106 S.Ct. 433, 436-37 (1985), where the Court again left unresolved the "jurisdictional or prudential?" issue.

Of course, in the instant case, even if the defect were not jurisdictional, prudential considerations would dictate that the issue not be considered, just as this Court concluded in *Gates* and *Heath*.

ciples of federalism were this Court to grant certiorari and sit in judgment of the Supreme Court of Vermont for failing to make a ruling it was never asked to make.

The statutory requirement that issues be presented to the state courts before they are brought here exists precisely to avoid that sort of friction between this Court and the state courts. As explained in *Webb*, 451 U.S. at 499-500:

> [A]lthough the States are sovereign entities, they are bound along with their officials, including their judges, by the Constitution . . . . Principles of comity in our federal system require that the state courts be afforded the opportunity to perform their duty, which includes responding to attacks on state authority based on the federal law . . . . As the Court has elsewhere observed, this princip[le] of comity requires
>
> > 'a proper respect for state functions, a recognition of the fact that the entire country is made up of a Union of separate state governments, and a continuance of the belief that the National Government will fare best if the States and their institutions are left free to perform their separate functions in their separate ways.' *Younger v. Harris* 401 U.S. 37, 44 (1971).

It is, accordingly, "unseemly in our dual system of government for a federal . . . court to upset a state court [decision] without an opportunity to the state courts to correct a constitutional violation." *Webb*, 451 U.S. at 500, quoting *Picard* v. *Connor*, 404 U.S. 270, 275 (1971). See also, *Illinois v. Gates*, 462 U.S. 213, 219 (1983).[2]

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[2] Beyond the principle of comity, there are also "very practical reasons for insisting that federal issues be presented first in the state-court system." *Webb*, 451 U.S. at 500. Requiring presentation of federal issues first in the state courts

> permits the state courts to exercise their authority, which federal courts, including this one, do not have at least to the

The Petition seeks to excuse the failure to present the issue to the state courts in two ways, neither of which bears analysis.

First, petitioners claim that "it appeared unnecessary" to raise in the state courts the question brought here, because neither respondents nor the lower courts "questioned . . . that a finding of unconstitutionality would lead to a refund . . . until the Supreme Court of Vermont rendered the decisions here challenged" (Pet. 5, n.3). But this is not a case where a constitutional issue was created for the first time by an unexpected ruling of the highest court in the State. Petitioners' constitutional claim to a refund did not arise by virtue of the ruling of the Supreme Court of Vermont: that claim could have been asserted at any time during the course of the litigation in the state courts. Petitioners were on notice in both the Superior Court and the Vermont Supreme Court that respondents were opposing their refund claim as unauthorized under Vermont law.[3] Yet petitioners

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same extent, to construe state statutes so as to avoid or obviate federal constitutional challenges . . . [*Id.* at 500.]

The court below was asked by petitioners to construe the state refund statute, 23 V.S.A. § 3020(b), without any notice that petitioners would later contend in *this* Court that the absence of a refund is a violation of the Federal Constitution.

[3] Petitioners are simply not correct in contending that their entitlement to a refund under state law was not "questioned . . . until the Supreme Court of Vermont rendered the decisions here challenged." When petitioners first moved for a refund order in the *Superior Court*, respondents *opposed* it (see pp. 3-4, *supra*). The Superior Court *denied* the motion for a refund order, ruling that petitioners' quest for a refund in this litigation was barred by sovereign immunity (Pet. App. 32a). And while that court, in dictum, observed that "[a]rguably" petitioners might be able to seek a refund through a different proceeding—an application to the Commissioner of Motor Vehicles, which could then be appealed to the Superior Court which in turn could then address "*whether* taxes should be refunded" (*id.* at 32a; emphasis added)—that dictum

In the instant case, petitioners elected not to file a petition for rehearing (styled "motion for reargument" in Vermont). Thus, even were they correct, as they are not, that the occasion for invoking their constitutional claim arose for the first time as a result of the decision of the Supreme Court of Vermont, petitioners failed to take the necessary steps thereafter to confer jurisdiction on this Court.[5]

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rather generalized federal claim that had been presented to the state courts.

[5] Nor can petitioners take comfort in the wording of Rule 40, Vt. Rules of Appellate Procedure:

> The motion [for reargument] shall state with particularity the points of law or fact, *presented in the briefs upon the original argument*, which in the opinion of the moving party the court has overlooked or misapprehended and which would probably affect the result. [Emphasis added.]

The italicized language serves an obvious purpose for the generality of cases, but the Supreme Court of Vermont has made clear that it does not bar the presentation of a new claim "if a material mistake of law is made by the Court in deciding questions of law." *Spaulding et al. v. Mut. Life In. Co. of N.Y.*, 94 Vt. 42, 54, 109 A. 22, 28 (1920).

> The general rule undoubtedly has such a limitation . . . It should be, and we have no doubt is, the desire of courts to rectify any mistakes into which they may fall, when they may do so without contravening public policy and without working further injustice . . . No mere pride of opinion will be suffered to stand in the way of accomplishing this result. [*Ibid.*]

The Court also indicated in *Spaulding* that new claims can be made on reargument where the Court's opinion rests on a ground that could not have been anticipated. *Ibid.* See also, *In re Maher*, 132 Vt. 560, 562, 326 A.2d 142, 143-44 (1974) (despite rule against consideration on appeal of claims that were not made in the proceeding below, "questions of alleged constitutional import" will be considered on appeal although not raised below).

There is thus no doubt that the Supreme Court of Vermont would have entertained a motion for reargument raising the federal claim. But even if there *were* doubt, that would not excuse petitioners' failure to file such a motion. The purpose of 28 U.S.C. § 1257(3) is to afford state courts the *opportunity* to consider federal claims

Second, petitioners seek to excuse their failure to raise below the issue that they seek to present here by suggesting that that issue was subsumed in their attack on the constitutionality of the taxes: "As the lawsuits were originally filed, the claim of entitlement to a refund was made as an integral part of the constitutional attack on the validity of the taxes." (Pet. 5, n. 3.) See also, *id.* ("the sub-issue of remedy"). This effort, too, is without merit, for as petitioners concede, the issue they tender here is "a distinct federal question" from that presented to and decided by the Vermont courts (Pet. 5 n.3).

Petitioners' complaints in *ATA I* and *ATA II* were cast in the usual form: in the body they alleged that the state fee statutes were unconstitutional, and in the prayer for relief they requested a refund, without identifying the source of their alleged entitlement to a refund. No doubt these complaints were broad enough to have *enabled* petitioners thereafter to contend that the Federal Constitution was the source of their entitlement. But the fact is that they never made that contention. Instead, when it came time for petitioners to particularize their claim for relief, they urged exclusively that *Vermont law* entitled them to a refund as a remedy for the constitutional violation. The consequence is that the Vermont courts never understood that there was a federal remedy issue to address, and they did not address any such issue. They focused exclusively, as petitioners asked them to, on the state law grounds for refund invoked by petitioners.[6]

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before they are brought to this Court, not to require those courts to *decide* them. See, *e.g.*, *Cardinale*, *supra*, 394 U.S. at 439.

[6] The analytical considerations that go into deciding whether a state fee statute violates the Commerce Clause are entirely distinct from those that go into deciding whether the Federal Constitution requires state courts to enter monetary awards against state funds in the face of the States' invocation of sovereign immunity from such awards (see pp. 18-23, *infra*). And as this Court explained in *Gates*, *supra*:

> "[D]ue regard for the appropriate relationship of this Court to state courts," *McGoldrick v. Compagnie Generale Transatlan-*

II. EVEN IF THE QUESTION SOUGHT TO BE PRESENTED HERE HAD BEEN PROPERLY RAISED IN THE VERMONT COURTS, THAT QUESTION WOULD NOT WARRANT THIS COURT'S CONSIDERATION.

The Supreme Court of Vermont has held that the State's sovereign immunity precludes the state courts of Vermont from entering monetary awards that would be paid from state funds to recompense those injured by state statutes ultimately held to contravene the Federal Constitution. Under Vermont's system of separated powers, only the state legislature can waive the State's sovereign immunity, and the court below concluded that the state legislature had not waived that immunity to allow the courts to enter a monetary award in this case.

Petitioners ask this Court to reverse that holding, contending that the Federal Constitution required the state courts of Vermont to enter a monetary award to be paid from state funds notwithstanding the State's assertion that its sovereign immunity foreclosed its courts from entering such an award. Petitioners' contention does not warrant this Court's attention, for it has been settled in this Court for more than a century that the Constitution did not take away the States' sovereignity in their own courts.[7]

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tique, 309 U.S. [430], at 434-435 [1940)], demands that those courts be given an opportunity to consider the constitutionality of the actions of state officials, *and, equally important, proposed changes in existing remedies for unconstitutional actions.* [462 U.S. at 221-22; emphasis added.]

Here, as in *Gates*, there never occurred in the state courts "the adversarial dispute necessary to apprise the state court of the arguments" sought to be presented here, and petitioners' remedy claim is "a separate claim that had to be specifically presented to the state courts," 462 U.S. at 223. See also, *Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263, 276-77 (1984).

[7] In addition to seeking a change of this well-settled proposition, for petitioners to prevail they would have to establish a second

That proposition was first established in *Beers v. Arkansas*, 61 U.S. 527 (1858), holding that the Arkansas state courts were not obliged to entertain a monetary claim against the State for impairing the obligation of contracts in violation of the Federal Constitution:

> It is an established principle of jurisprudence in all civilized nations that the sovereign cannot be sued in its own courts . . . without its consent and permission; but it may, if it thinks proper, waive this privilege, and permit itself to be made a defendant in a suit by individuals, or by another State. And as this permission is altogether voluntary on the part of the sovereignty, it follows that it . . . may withdraw its consent whenever it may suppose that justice to the public requires it. [*Id.* at 529.]

Accord: *Memphis & C.R. Co. v. Tennessee*, 101 U.S. 337, 339 (1880); *Cunningham v. Macon & B.R. Co.*, 109 U.S. 446, 451 (1883).

That this remains the Court's understanding today is evident from *Nevada v. Hall*, 440 U.S. 410 (1979), which described the States' immunity from suit in their own courts as follows:

> The immunity of a truly independent sovereign from suit *in its own courts* has been enjoyed as a matter of absolute right for centuries. Only the

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proposition as well: that the Federal Constitution creates an implied cause of action for monetary relief against States in their own courts. *Compare, Edelman v. Jordan*, 415 U.S. 651, 672 (1974); *Fitzpatrick v. Bitzer*, 427 U.S. 445, 456 (1976). For Congress has not created a statutory cause of action that would be applicable here. The complaint in *ATA II* invoked 42 U.S.C. § 1983. But it is doubtful that Commerce Clause claims are maintainable under § 1983, as that Clause does not secure individual rights of the type protected by § 1983. See, *e.g., Consolidated Freightways Corp. of Del. v. Kassel*, 730 F.2d 1139, 1142-47 (8th Cir. 1984), *cert. denied*, —— U.S. ——, 105 S.Ct. 126 (1984); *J & J Anderson, Inc. v. Town of Erie*, 767 F.2d 1469, 1476 (10th Cir. 1985). In any event, Congress did not in § 1983 create a cause of action for monetary relief against *state* funds. *Edelman v. Jordan, supra*, 415 U.S. at 672, 675-77; *Quern v. Jordan*, 440 U.S. 332, 340-41 (1979).

sovereign's own consent could qualify the absolute character of that immunity.

* * *

[N]o sovereign may be sued *in its own courts* without its consent. [440 U.S. at 414, 416; emphasis added].

Indeed, this premise lies at the heart of this Court's Eleventh Amendment jurisprudence. It is, of course, settled beyond peradventure that, by reason of that Amendment, a *federal* court may not, in a suit against state officers, require a State to refund taxes collected under a statute violative of the Commerce Clause. *Ford Motor Co. v. Department of Treasury*, 323 U.S. 459 (1945).[8] To conclude that the Federal Constitution requires *state* courts to order the refund of such taxes would mean that the Eleventh Amendment is simply a forum-selector, reflecting a preference that monetary awards against States be imposed in the state courts rather than the federal. But the controlling decisions of this Court have recognized that that is *not* the significance of the Eleventh Amendment. Rather, the framers recognized and accepted that the States could *not* be sued in their *own* courts without their consent, and the purpose of the Eleventh Amendment was to assure that the sovereignty thus retained in the *state* courts would not be vitiated by the entertaining of unconsented to suits against States in the *federal* courts.

In *Hans v. State of Louisiana*, 134 U.S. 1 (1890), which this Court has identified as the source of the current understanding of the meaning of the Eleventh Amendment,[9] the Court described the "anomalous result"

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[8] *Ford Motor Co.* was quoted as authoritative in *Edelman v. Jordan, supra*, 415 U.S. at 663, in *Quern v. Jordan, supra*, 440 U.S. at 346 n.17, and in *Pennhurst State School & Hosp. v. Halderman*, 465 U.S. 89, 101 (1984).

[9] See, *e.g., Pennhurst, supra*, 465 U.S. at 98 (1984); *Atascadero State Hosp. v. Scanlon*, —— U.S. ——, 105 S.Ct. 3142, 3145, 3148 n.3 (1985).

that would be produced were the Constitution construed to permit federal question suits against States in federal court, *id.* at 10:

> [W]e should have this anomalous result, that in cases arising under the Constitution or laws of the United States, a State may be sued in the federal courts by its own citizens, . . . *although not allowing itself to be sued in its own courts.* [Emphasis added.]

The *Hans* Court recounted at length the historical support for the proposition that States are not suable in their own courts without their consent, as we detail in the margin.[10] That understanding was reiterated, on

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[10] The *Hans* Court cited as authoritative Justice Iredell's understanding of the original intent of the Constitution's framers, expressed in his dissent to the decision that was overturned by the Eleventh Amendment, *Chisholm v. Georgia*, 2 U.S. 419 (1793). According to the decision in *Hans*, Justice Iredell correctly

> contended that it was not the intention to create new and unheard of remedies, by subjecting sovereign States to actions at the suit of individuals (which he conclusively showed was never done before), but only . . . to invest the federal courts with jurisdiction to hear and determine controversies and cases . . . that were properly susceptible of litigation in courts. [134 U.S. at 12.]

The *Hans* Court also quoted from Hamilton, in Federalist No. 81, that

> It is inherent in the nature of sovereignty not to be amenable to the suit of an individual without its consent. That is the general sense and the general practice of mankind; and the exemption, as one of the attributes of sovereignty, is now enjoyed by the government of every State in the Union. Unless, therefore, there is a surrender of this immunity in the plan of the convention, it will remain with the States . . . [T]here is no color to pretend that the state governments would, by the adoption of that plan, be devested of the privilege of paying their own debts in their own way, free from any constraint but that which flows from the obligations of good faith. [134 U.S. at 13.]

The *Hans* Court quoted Madison and Marshall to the same effect, 134 U.S. at 14, and expressly reaffirmed the declarations in *Cunning-*

the basis of the same historical materials, in *Smith v. Reeves*, 178 U.S. 436, 440-49 (1900), and *Monaco v. Mississippi*, 292 U.S. 313, 322-30 (1934).[11]

In the face of this uniform decisional law, petitioners invoke a number of decisions that are wholly inapposite. In none of the decisions petitioners cite was a State resisting a refund order on the ground that it enjoyed sovereign immunity from such an award in its courts, and in none had the state court refused a refund on the basis of sovereign immunity. In none of these cases, accordingly, did this Court address the question whether the Federal Constitution stripped States of sovereign immunity in their own courts in federal question suits. Indeed, in only three of the cases cited by petitioners did this Court hold that a refund was required, and two of those—*Ward v. Love County*, 253 U.S. 17 (1920) and *Iowa-Des Moines Nat. Bank v. Bennett*, 284 U.S. 239 (1931)—were suits to recover money from counties, which were never understood in this country to share the States' sovereign

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ham v. Macon & B.R. Co., supra, and *Beers v. Arkansas, supra*, that states cannot be sued in their own courts without their consent, 134 U.S. at 16-17.

[11] See also, *Ford Motor Co., supra* 323 U.S. at 465, where the Court took as given that a State's waiver of immunity is required for a suit against the State based on the Commerce Clause to be maintained in state courts. In holding that an action in the federal courts for refund of taxes alleged to violate the Commerce Clause was barred by the Eleventh Amendent, the *Ford Motor Co.* Court noted that the State legislature had enacted a "tax refund statute as *a waiver of state immunity from suit in state courts*" (emphasis added). The Court added. "*'When* a state authorizes a suit against itself to do justice to taxpayers who deem themselves injured by any exaction, it is not consonant with our dual system for the federal courts to read *the consent* to embrace federal as well as state courts . . . [W] are dealing with *the sovereign exemption from judicial interference in the vital field of financial administration . . .'* "*Id.*, quoting *Great Northern Insurance Co. v. Read*, 322 U.S. 47, 54 (1944).

immunity.[12] In the third, *Carpenter v. Shaw*, 280 U.S. 363 (1930)—the lone case requiring a refund order against a State—not only was there no claim of sovereign immunity, but the state legislature had created a statutory cause of action in state court, authorizing its courts to order refunds of taxes collected by "the state," and the claim for a refund was brought in state court on the basis of that statute. See *Carpenter v. Shaw*, 134 Okla. 29, 272 Pac. 393, 395 (1928).

In sum, the question petitioners seek to present here has already been decided by this Court, adversely to petitioners' position, and that question accordingly does not warrant this Court's attention.[13]

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[12] See, *e.g.*, *County of Lincoln v. Luning*, 133 U.S. 529 (1890); *Moor v. County of Alameda*, 411 U.S. 693, 717-18 (1973).

[13] Petitioners state that "without a refund requirement, the power of the Commerce Clause to deter the enactment of a series of discriminatory levies is greatly diminished, as the present case illustrates" (Pet. 13; see also, *id.* 13-14 nn.7, 8). But now that the Vermont Supreme Court has definitively settled that there is not a state law entitlement to refund, the lower Vermont courts have been issuing escrow orders in suits challenging subsequent tax statutes, reasoning that such preliminary relief is necessary because there is no adequate remedy at law. *American Trucking Associations, Inc. v. Conway*, Dkt. No. S-147-86 WnC [Vt], St. Tax. Rep. (CCH) ¶ 200-263 at 10,338-39 (Vt. Super. Ct. May 21, 1986); *American Trucking Associations, Inc. v. Conway*, Dkt. No. S-95-86 WnC [Vt.] (Vt. Super. Ct. Apr. 14, 1986); petition by State for review of these orders is pending in Supreme Court of Vermont.

CONCLUSION

For the reasons set forth above, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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APPENDIX A

IN THE SUPREME COURT
OF THE STATE OF VERMONT

Supreme Court Docket Number 83-484

AMERICAN TRUCKING ASSOCIATIONS, INC., *et al.*,
Plaintiff-Appellee

v.

WILLIAM CONWAY, VERMONT COMMISSIONER OF MOTOR VEHICLES, *et al.*,
Defendant-Appellant

Appeal From The Washington Superior Court
Docket Number S185-82WnC

APPELLANT'S BRIEF

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* * * *

CONCLUSION

For the foregoing reasons the challenged statutes meet the tests set forth in *Complete Auto Transit v. Brady*, supra, 430 U.S. 274, and their constitutionality should be upheld. Appellant seeks a reversal of the Washington Superior Court's Order of August 31, 1983, and entry of judgment on the merits in favor of the State.

APPENDIX B

IN THE SUPREME COURT OF THE
STATE OF VERMONT

SUPREME COURT DOCKET NUMBER 83-484

[Caption Omitted in Printing]

APPELLEES' BRIEF AND
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1. Monetary relief is an appropriate remedy in this action.

2. The Trial Court has jurisdiction to award monetary relief in this action.

3. The doctrine of sovereign immunity does not apply under the facts in this matter.

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STATEMENT OF THE CASE

On June 2, 1982, the Plaintiffs, American Trucking Associations, Inc., Chemical Leaman Tank Line Incorporated and Anderson Trucking Service, Inc. filed a "Complaint for Injunctive and Declaratory Relief" in the Washington Superior Court challenging the constitutionality of 23 V.S.A. 415, 3007 and 3010, all as enacted and amended pursuant to No. 172 of the Acts of the 1982 (1981 adjourned) session of the Vermont Legislature. By Stipulation of the parties dated October 7, 1982, (Printed Case, p. 3), it was agreed that the named Plaintiffs would represent a class defined as all interstate motor carriers whose base-plate truck registrations are issued by jurisdictions other than the State of Vermont, and who were then, or in the future might become, subject to the licensing requirements and fees set forth in the challenged statutes.

The Plaintiffs requested a declaration that the said statutes, 23 V.S.A. 415, 3007 and 3010, violates the provisions of the Commerce Clause of the United States Constitution, the Supremacy Clause of the United States Constitution, the Fifth and Fourteenth Amendments to the United States Constitution, the Privileges and Immunities Clause of the United States Constitution, and Chapter I, Article 9 of the Vermont State Constitution. The Plaintiffs further requested that the Defendants be permanently enjoined from demanding, receiving or accepting any fees paid to them by Plaintiffs pursuant to the said statutes, and from the enforcement or execution of the aforesaid statutes directed against motor trucks not registered in the State of Vermont, or their owners or operators. (Printed Case, p. 3). The Plaintiffs also requested that the Court direct the Defendants to refund to Plaintiffs and members of the Plaintiff class any fees, fines or penalties wrongfully, illegally or unconstitutionally collected from said Plaintiffs by Defendants pursuant to the statutes in question. The mechanism for such

refunds was stipulated to by the parties on October 7, 1982. (Printed Case, p. 3).

On August 31, 1983, the Washington Superior Court, the Honorable James L. Morse presiding, issued its opinion and order. The Court decreed that §§ 415, 3007 and 3010 of Title 23 violate the Commerce Clause of the United States Constitution. (Printed Case, p. 8). The Order contained no discussion of the several other constitutional issues raised by Plaintiffs although they were briefed by the parties. The Defendants appealed from the said Order by Notice of Appeal dated September 30, 1983. (Printed Case, p. 10).

The said Judgment Order made no reference to Plaintiffs' request for repayment of the fees, fines or penalties collected by Defendants pursuant to the said statute. Therefore, Plaintiffs filed a "Motion to Alter the Judgment Order" in the case, dated September 9, 1983. (Printed Case, p. 9). In their motion, Plaintiffs requested that the said fees, fines and penalties be refunded by Defendants in accordance with the aforesaid Stipulation of the parties dated October 7, 1982. (Printed Case, p. 3). The said motion was denied by the Court in its "Opinion and Order" dated December 7, 1983. (Printed Case, p. 12). The Plaintiffs appealed from that order by Notice of Appeal dated December 19, 1983. (Printed Case, p. 13).

This matter is therefore the subject of cross-appeals. The appeal filed by the Defendants relates to the declaration by the Washington Superior Court that the statutes in question are unconstitutional. The Plaintiffs' cross-appeal relates solely to the issue of whether, as a part of its Judgment Order in this case, the Washington Superior Court should have awarded to the Plaintiffs and the members of the Plaintiff class monetary relief in accordance with the requests set forth in their Complaint, and the October 7, 1982 stipulation of the parties.

* * * *

Statement of Issues Presented

I. Was the Court correct in its conclusion that the $50 fuel user fees imposed by 23 V.S.A. 415, 3007 and 3010 violate the Commerce Clause of the United States Constitution?

II. Do the taxing provisions of 23 V.S.A. 415, 3007 and 3010 unlawfully and unconstitutionally discriminate against interstate motor carriers in violation of the Privileges and Immunities Clause of the United States Constitution, Article IV, Section 2, Clause 3, the Fifth and Fourteenth Amendments of the United States Constitution, Article IV, Section 2, Clause 3, the Fifth and Fourteenth Amendments of the United States Constitution, and Chapter 1, Article 9 of the Vermont Constitution? Are these taxing provisions also in conflict with lawful, controlling, and preemptive federal statutes and regulations and therefore void pursuant to the Supremacy Clause of the United States Constitution, Article 6, Clause 2?

III. Did the Washington Superior Court err in refusing to order the Defendants to repay to Plaintiffs and members of the Plaintiff class all fees, fines or penalties collected by Defendants pursuant to the Diesel Fuel Tax Act (23 V.S.A. 415, 3007 and 3010 all as enacted or amended pursuant to Act No. 172)?

ARGUMENT

* * * *

III. *THE REFUSAL OF THE WASHINGTON SUPERIOR COURT TO ORDER THE DEFENDANT TO REPAY TO PLAINTIFFS AND MEMBERS OF THE PLAINTIFF CLASS ALL FEES, FINES OR PENALTIES COLLECTED BY DEFENDANTS PURSUANT TO THE DIESEL FUEL TAX ACT (23 V.S.A. 415, 3007 AND 3010 ALL AS ENACTED OR AMENDED PURSUANT TO ACT NO. 172) WAS ERRONEOUS FOR THE FOLLOWING REASONS:*

1. *MONETARY RELIEF IS AN APPROPRIATE REMEDY IN THIS ACTION*
2. *THE TRIAL COURT HAS JURISDICTION TO AWARD MONETARY RELIEF IN THIS ACTION*
3. *THE DOCTRINE OF SOVEREIGN IMMUNITY DOES NOT APPLY UNDER THE FACTS IN THIS MATTER*

A. Introduction—

The matter appealed herein was commenced pursuant to the Declaratory Judgments Act, 12 V.S.A. 4711 *et seq.* In their Complaint, Appellees requested that the Trial Court declares 23 V.S.A. 415, 3007 and 3010 unconstitutional. Appellees further requested that the Court direct the appellants to refund any fees, fines or penalties collected pursuant to the statutes in question.

By stipulation dated October 7, 1982, (Printed Case, p. 3) the parties to this action agreed as follows:

> That in the event the (Diesel Fuel Tax) Act is finally declared to be unconstitutional and void in whole or in part, by Order of a Vermont Superior Court or any higher court having competent appeals jurisdiction thereof, any fees and penalties wrongfully and

> illegally obtained by the State of Vermont and its instrumentalities and ordered to be repaid thereby may be refunded pursuant to 23 V.S.A. 3020 . . ., 23 V.S.A. 328 or in any other manner ordered by such Court.

While the Trial Court has declared the statutes unconstitutional (Opinion and Order of Washington Superior Court, dated August 31, 1983, Printed Case, p. 8) it has refused to order refunds of fees, fines or penalties collected under said statutes (Opinion and Order of Washington Superior Court, dated December 7, 1983, Printed Case, p. 12). The Trial Court's refusal to order refunds was based on three grounds. First, the declaration of unconstitutionality is a sufficient remedy and therefore monetary relief is not necessary or appropriate. Second, the Trial Court does not have jurisdiction to award monetary relief. Finally, "an award of a monetary judgment is barred by the doctrine of sovereign immunity."

Appellees contend that the Trial Court erred in denying the request to order refunds of all fees, fines or penalties collected pursuant to 23 V.S.A. 415, 3007 and 3010.

B. *Monetary Relief is an appropriate remedy in this action.*

The Trial Court cites *Neil v. Brockway*, 136 Vt. 119 (1978) in support of its conclusion that injunctive and monetary relief is not necessary in this case. However, that decision does not limit or remove the Superior Court's jurisdiction to issue monetary awards as part of its judgment in declaratory judgment actions. In relevant portions, it simply held that claims for monetary relief are not a required pleading in declaratory judgment actions. It does not stand for the proposition that a Superior Court is unable to entertain monetary claims as a part of its declaratory judgment jurisdiction.

Likewise, *Auclair v. Vermont Electric Power Co.*, 133 Vt. 22 (1974) does not limit the ability of the Superior Court to make monetary awards in the context of this action. That case construed the jurisdiction of the Superior Court *vis-a-vis* that of the Public Service Board. It is of no assistance in our determination of whether the Washington Superior Court can make monetary awards within the ambit of the Declaratory Judgments Act.

It is clear from the interpretation of the Uniform Declaratory Judgment Act made by the courts of other jurisdictions that monetary relief is an appropriate result in the context of declaratory judgment actions. In *New Haven Water Co. v. City of New Haven*, 4 A.2d 763, 131 Conn. 456, it was held that Plaintiff was entitled to interest as damages for detention of water charges in an action for declaratory judgment. Likewise, in another proceeding for a declaratory judgment, it was held that a landlord was entitled to a money judgment for rent due and unpaid even though not prayed for in the original petition. *McNally v. Moser*, 122 A.2d 555, 210 Md. 127, 60 A.L.R.2d 388 (1956).

The policy behind this rule is based upon the general consideration that once equity has attached the court should give full and complete relief in the interest of judicial economy. *Langevin v. Hillsborough County*, 320 A.2d 635 (N.H. 1974). This principle has been held applicable in declaratory judgment actions, *Phil J. Corp. v. Markle*, 241 A.2d 718 (Md. 1968), including such actions brought to test the constitutionality of a tax statute. *Berry v. Daigle*, 322 A.2d 320 (Maine, 1974). In *Berry*, the court stated that:

> A proceeding for declaratory judgment may be maintained even though an alternative remedy is available. The action is not contingent on the exclusivity of the remedy . . . Therefore, despite the fact that the regular procedure for recovery of taxes invalidly collected was by a common law action in

> assumpsit for money had and received . . . a declaratory judgment may be issued establishing the legality of the taxing authority and the rights of the parties with respect to the moneys collected. This position is in concert with the law of the majority of jurisdictions which have enacted the Uniform Declaratory Judgments Act and have considered its use in testing the constitutionality of a state law. *Id.* at p. 325; see 11 A.L.R.2d 359.

In *American Trucking Associations, Inc. v. Commonwealth of Kentucky*, Franklin Circuit Court, Ky. (82-CI-1033, January 6, 1983), the Court ruled that Plaintiffs were entitled to refunds of highway use fees after determining that the statute authorizing the fee was unconstitutional. Furthermore, the Court specifically ordered the Defendants to refund the fees "without the necessity of further hearings or orders of the court."

Similarly, in *American Trucking Association, Inc. v. Quinn*, 437 A.2d 623 (Maine, 1981), Plaintiff brought a declaratory action to test the constitutionality of a highway use tax statute. The Maine Supreme Judicial Court, in affirming the trial court's judgment that the statute was unconstitutional, ordered the Trial Court, on remand, to determine the disposition of fees collected under the unconstitutional statute and held in escrow. The propriety of monetary relief as an appropriate remedy in a declaratory action was assumed by the Court.

Finally, Appellees urge that the parties to this action, pursuant to their Stipulation which is set out in part A of this section, contemplated an order by the Trial Court requiring a refund of fees, fines or penalties in the event the questioned statutes were found to be unconstitutional.

Appellees respectfully request that the Supreme Court direct the Washington Superior Court to order a refund of all fees, fines or penalties which have been illegally collected by the state pursuant to 23 V.S.A. 415, 3007 and 3010.

C. *The Trial Court has jurisdiction to order monetary relief in this action.*

In its Opinion and Order dated December 7, 1983 (Printed Case, p. 12) the Trial Court, in refusing to order refunds, indicated that it lacked jurisdiction to "determine whether taxes should be refunded" in this action. The Court first recognized that it is empowered, under 23 V.S.A. 3023, to conduct, on the petition of an aggrieved taxpayer, a *de novo* review of any "decision, order or finding of the Commissioner of Motor Vehicles" made under the Diesel Fuel Tax Act. The Court then decided that, because the Commissioner has not yet issued a decision pertaining to refunds of fees collected under 23 V.S.A. 415, 3007 and 3010, it lacked jurisdiction to determine whether the fees should be refunded.

The Appellees respectfully submit that it is not necessary that the Court base its jurisdiction to order a refund in this action solely on the provisions of 23 V.S.A. 3023. There is another basis for jurisdiction, namely the power of the court in a declaratory judgment action to afford full and complete relief. The Vermont Supreme Court has often endorsed the doctrine that the "purpose of a declaratory judgment action is to enunciate, so far as is requested, the rights of the parties . . . and injunctive relief may be granted in such actions." *Groves v. Town of Waitsfield*, 130 Vt. 292 A.2d 247 (1972). There is little question that this doctrine completely empowers the Trial Court to order refunds in this action and it need look no further for a jurisdictional nexus with the refund issue.

It should also be noted that the Trial Court presently has before it all of the information required to determine the amount of fees, fines or penalties due as refund, as well as all parties claiming such refunds. Certainly it is more appropriate, in the interests of judicial economy, that the Trial Court proceed with its determination at this time.

D. *The doctrine of sovereign immunity does not apply in this action—*

In its Opinion and Order dated December 7, 1983, the Trial Court reaches certain conclusions of law on the subject of sovereign immunity which are contradictory. The Court first states that, based upon the doctrine of sovereign immunity, it is barred from making any monetary award in this matter. However, the Court then recognizes that, in the event of an appeal from a decision of the Commissioner of Motor Vehicles, under 23 V.S.A. 3020(b), denying repayment of fees illegally or wrongfully obtained, the Superior Court would have jurisdiction to conduct a *de novo* review of such decision pursuant to 23 V.S.A. 3023. Although the Trial Court recognizes the existence of 23 V.S.A. 3020(b) in a footnote to its Opinion, it fails to consider the full implication of that statute. If indeed the doctrine of sovereign immunity applies at all in this matter, a point which Appellees explicitly dispute, any protection thereunder which might otherwise be claimed by the state has been waived through the enactment of said Section 3020(b).

The Trial Court states that *Stoneman v. Vergennes School District #5,* 139 Vt. 50 (1980) discusses the type of sovereign immunity found in this case. However, the character of the statute forming the basis of the Supreme Court's decision in that case (16 V.S.A. 830(a)(c)), is quite unlike that found at 23 V.S.A. 3020(b). Section 3020(b) speaks in mandatory language, and is not based upon any requirement that the legislature appropriate sufficient funds to make repayment under it. On the other hand, the statute construed in *Stoneman* is not mandatory in its language, but rather bases tuition reimbursement to school districts upon the size of the legislative appropriation for that purpose.

The Trial Court also cites *Edelman v. Jordan,* 415 U.S. 651 (1974). It is of little relevance to the consid-

erations in this case. It deals with the more basic sovereign immunity rule under the Eleventh Amendment of the United State Constitution; i.e. a state must consent to suits in Federal Courts brought by its citizens or citizens from other states. *Edelman* also shares no factual similarity with the present case as it dealt with an analysis of Federal Regulations controlling the processing of welfare claims. These Regulations contained no mandatory reimbursement provision such as that found in 23 V.S.A. 3020(b).

As noted in *Stoneman*, the doctrine of sovereign immunity was "once venerated, resently vilified, and (is) presently substantially limited" in scope. *Supra*, p. 53. (Material in parenthesis added). Sovereign immunity is not as broad in scope as the Trial Court's Order implies.

The doctrine of sovereign immunity does not apply to declaratory judgment suits relating to constitutionality. See for example, *Grinnell v. State*, 435 A.2d 523, 121 N.H. 823 (1981), *Larson v. Domestic and Foreign Commerce Corporation*, 337 U.S. 682, 690 (1949). In addition to that, it may be waived, either by express or reasonably implied consent of the legislature by statute. *State Employees Association of New Hampshire Inc. v. Belknapp County*, 438 A.2d 969 (N.H. 1982). The policy consideration behind expressed or implied waiver of sovereign immunity by the legislature of a state is, as so aptly noted in *O'Neill v. State Highway Department*, 50 N.J. 307, 235 A.2d 1, 5, N.1 (1967), based upon the principle that:

> The courts will adjudge monetary claims founded upon statute, because the Legislature has inferentially indicated an intent to provide the sums needed to make good the statutory scheme. See *City of East Orange v. Palmer, supra.*, 47 N.J. 329, 200 A.2d 679; *Amantia v. Cantwell*, 89 N.J. Super. 7, 12-13, 213 A.2d 251 (App. Div. 1965).

The waiver of sovereign immunity in this case is explicit. 23 V.S.A. 3020(b) provides:

> If the Commissioner determines that a tax, penalty, interest or fee required by this chapter has been paid more than once by a licensee, or has been *illegally or erroneously collected* or computed, the excess amount paid or collected shall be credited to the tax account of the licensee, and the licensee shall be notified thereof by mail. Any balance of the excess amount remaining in the licensee's account after crediting the overpayment shall be refunded if requested within 30 days of the date of mailing notice. (emphasis added)

The language of this statute is mandatory, not permissive. In light of our earlier discussion relating to the propriety of an award of monetary damages by the Superior Court in this case, Appellees would respectfully request that the Supreme Court reverse the Washington Superior Court's decision that sovereign immunity prohibits the refund of any taxes, penalties, or interest or fees wrongfully collected by the Commissioner pursuant to the provisions of 23 V.S.A. 415, 3007 and 3010, and that the Supreme Court direct that appropriate refunds take place.

CONCLUSION

For the reasons set forth above the Appellees respectfully request that the Honorable Court uphold the decision of the Washington Superior Court that the fuel user license fees imposed by 23 V.S.A. 415, 3007 and 3010 are unconstitutional and void, and further that the Honorable Court direct the Washington Superior Court to order repayment of all fees, fines or penalties collected by Defendants pursuant to said unconstitutional statutes in accordance with the request for relief set forth in Plaintiff's Complaint.

[Signatures omitted]

APPENDIX C

IN THE SUPREME COURT OF THE STATE OF VERMONT

SUPREME COURT DOCKET NUMBER 83-484

[Citation Omitted in Printing]

APPELLANT'S REPLY BRIEF

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* * * *

III. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN REFUSING TO ORDER THE DEFENDANTS TO REFUND TO PLAINTIFFS ANY FEES, FINES, OR PENALTIES COLLECTED PURSUANT TO THE CHALLENGED ACT.

If this Court sustains the trial court in finding the challenged statutory provisions to be unconstitutional, this Court should also sustain the trial court in its refusal to order the defendants to repay to the plaintiffs any fees collected under the Act.

In defining the scope of review of this part of the trial court's Order, it is submitted that the proper standard is whether the trial court abused its discretion. It is clear that this case is a case in equity, seeking declaratory and injunctive relief. In equity, the chancellor has broad powers to fashion relief in such a manner as he determines is appropriate. The general principle is stated at 30 C.J.S. Equity, Section 10:

> The sound discretion of the court is the controlling guide of judicial action in every phase of a suit in equity, including . . . the propriety of granting relief. . . . So the granting of equitable relief is ordinarily a matter of grace . . . and the propriety of affording equitable relief rests in the sound discretion of the court, to be exercised according to the circumstances and exigencies of each particular case.

See, Brown v. Douglas, 50 F.Supp. 877 (N.D. Texas 1943).

As similarly stated by the U.S. Supreme Court in *Hecht Company v. Bowles,* 321 US 321, 329 (1943):

> An appeal to the equity jurisdiction . . . is an appeal to the sound discretion which guides the determinations of courts of equity . . . . The essence of equity jurisdiction has been the power of the

> chancellor to do equity and to mold each decree to the necessities of the particular case . . . between the public interest and private needs. . . .

See also, Porter v. Warner, 328 US 395, 398 1949).

The New Hampshire Supreme Court has expressed similar sentiments in *Crocker v. College of Advanced Science*, 268 A.2d 844, 847 (Sup. Ct. NH 1970) where it stated:

> The propriety of affording equitable relief in a particular case rests in the sound discretion of the trial court to be exercised according to the circumstances and exigencies of the case. The consequences of granting relief should be balanced against the need for it.

As noted above, in exercising its discretion in fashioning relief in an equity case, the trial court should consider the consequences of granting the requested relief as balanced against withholding relief. *See also, DiGiovanni v. Camden Fire Association*, 296 US 64 (1935). Moreover, the effect of granting relief must be weighed against the public interest, *Great Lakes Dock Company v. Huffman*, 319 US 293, 297-8 (1943), and ". . . a court vested with equity jurisdiction may in its sound discretion refuse to assume jurisdiction of a matter when the interests of justice would be furthered." *Bateman v. South Carolina Port Authority*, 298 F.Supp. 999, 1004 (D.S.C. 1969).

This Court has expressed comparable sentiments in reviewing equity decisions of a trial court. In *Johnson v. Johnson*, 125 Vt. 470, 473 (1966) this Court stated:

> If the chancellor has granted or denied relief by the exercise of discretion based on such equitable considerations, the result is reviewable only upon a clear and affirmative showing of abuse.

See also, Sparrow v. Cimonetti, 115 Vt. 292, 304 (1948).

Applying these standards to the trial court's decision here, it is clear that the trial court did not abuse its discretion in granting appellees their requested declaratory judgment, but refusing to order a refund of all fees already paid. As noted earlier, all of the fees collected under the challenged statutory scheme went to the state highway fund, and were used for road maintenance, including snow plowing, salting, sanding, as well as repairs and maintenance. Without this money, these tasks could not have been performed, and obviously, the Appellees had the full advantage of all the road maintenance performed by virtue of these fees. If these fees were to be refunded, it would amount to almost $6,000,000 at this point in time. Obviously, the department does not have this money, and there is no excess money anywhere in the state budget to pay for this. This Court can take judicial notice of the actions of the recent legislative session in trying to eliminate an already existing state deficit of approximately $45,000,000.

Thus, since the Appellees had the full benefit of road maintenance through the expenditure of these funds, and since a refund would have a most serious impact on the public interest and the state deficit, it was not at all unreasonable for the trial court to deny Appellees this form of requested relief. The trial court properly determined that ". . . a declaratory judgment is sufficient without the need for injunctive relief."

A somewhat analogous situation was presented in *Brattleboro Retreat v. Town of Brattleboro*, 106 Vt. 228, 238-9 (1934), where this Court held that a taxpayer could not recover taxes paid under a statute, because the taxpayer ". . . could not accept the provisions [of the Act] beneficial to it without obligating itself to perform the conditions imposed." Here, Appellees accepted the benefits of road maintenance under the statute, and thus cannot now seek a refund of the very fees paid that made road maintenance possible.

The trial court recognized that 23 V.S.A. §§3020 and 3023 authorized the Washington Superior Court to conduct a *de novo* review *after* a decision by the Commissioner of Motor Vehicles on a refund question. However, the trial court properly noted that this action was not brought pursuant to 23 V.S.A. § 3023 and that section provided the only statutory authority for a refund.

Appellees made a choice in bringing this class action for declaratory and injunctive relief, rather than proceeding in individual cases to seek refunds pursuant to 23 V.S.A. §§ 3020 and 3023. There were many benefits to Appellees by pursing this matter in the manner they chose. They were able to get prompt and class-wide declaratory relief, which, if upheld, would eliminate the fees in the future. However, by choosing this route, they forfeited any right they may have had to get a refund under the established statutory scheme. If they had proceeded under 23 V.S.A. §§ 3020 and 3023, there is no express statutory authority for class relief, and thus, it is very possible that the broad relief granted here would not have been available to them. See, *Chittenden Trust Company v. MacPherson*, 139 Vt. 281, 285 (1981). The Appellees, having made their choice of procedure, must live with the consequences, both favorable and unfavorable, of the choice. They cannot have it both ways.

A separate, yet related, basis on which the trial court denied Appellees request for a refund, is that the refund is barred by the doctrine of sovereign immunity. Once again, this determination by the trial court was correct, and did not amount to an abuse of discretion by the trial court.

In *Stoneman v. Vergennes School District No. 5*, 139 Vt. 50, 53 (1980) this Court reaffirmred the basic principle that "An action against the state cannot be maintained without the state's consent for injuries resulting from the exercise of essentially governmental functions,

as opposed to proprietary functions." There can be no doubt that the collection of the challenged fees in this case was the exercise of a governmental function.

Since there is no statutory authority for the relief sought by Appellees, there is no consent by the state. In *Stoneman* this Court noted that the Legislature denied funding, to show lack of consent. Here too, there is absolutely no state funding available to pay this refund. In *Stoneman* this Court also noted that the state has consented to be liable for certain tort claims, 12 V.S.A. § 5601. However, an examination of the exceptions to the Tort Claims Act buttresses Appellants' argument here. There is a specific exception for "Any claim based upon an act or omission of an employee of the state exercising due care, in the execution of a statute or regulation, whether or not such a statute or regulation be valid . . .", 12 V.S.A. § 5602(1), as well as an exception for "Any claim arising in respect to the assessment or collection of any tax . . ." 12 V.S.A. § 5602(2). These two exceptions cover precisely the situation presented by this case and make it abundantly clear that the state has not waived its sovereign immunity relative thereto.

The federal courts have reached the same result as the trial court did by their application of the Eleventh Amendment to the U.S. Constitution, as clearly set forth in the leading case of *Edelman v. Jordan*, 415 US 651 (1974). As the trial court correctly noted, that case, against a state welfare department, held that it was appropriate to grant prospective declaratory relief invalidating a state law or regulation, but that the federal courts would not order a refund of welfare benefits wrongfully denied under the state rules.

The relevance of *Edelman* is most compelling in showing the balancing of interests to be weighed in cases of this nature, and the trial court here reached the same conclusion as did the U.S. Supreme Court in *Edelman*. It granted prospective relief, but denied a refund of past

due monies. The same public interest considerations are present in both cases, and thus the *Edelman* rationale does provide further support for the trial court's determination.

Thus, although the trial court had the authority to declare the statute to be unconstitutional, *Larson v. Domestic and Foreign Commerce Corporation*, 337 US 682 (1949), it is clear that the trial court correctly decided that the doctrine of sovereign immunity barred the refund of monies sought by appellees.

In sum, the trial court properly exercised its equitable discretion in molding the relief in this case to fit the circumstances of the case, and the public interest, and since there was no abuse of this discretion, the trial court's determination rejecting Appellees' request for a refund should be upheld.

CONCLUSION

For the foregoing reasons, Appellants respectfully submit that the trial court's decision holding the challenged statutes to be unconstitutional under the commerce clause must be reversed, and this Court should determine that the challenged statutes are constitutional.

If this Court determines that the trial court was correct in holding the challenged statutes to be unconstitutional, this Court should also affirm the trial court's ruling denying Appellees a refund of all fees, fines or other monies collected pursuant to said statutes.

[Signatures Omitted]

APPENDIX D

IN THE SUPREME COURT OF THE STATE OF VERMONT

SUPREME COURT DOCKET NUMBER 83-484

[Caption Omitted in Printing]

APPELLEE'S REPLY BRIEF

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STATEMENT OF THE CASE

[The statement is verbatim the same as that in the opening brief, reprinted *supra* at pp. 6a-7a.]

* * * *

STATEMENT OF ISSUES PRESENTED

I. Should the opinions of the Trial court be set aside on the ground that Assistant Judges signed those opinions?

II. Was the refusal of the Trial Court to order the defendant to repay to Plaintiffs and members of the Plaintiff class all fees fines or penalties collected by Defendants pursuant to the Diesel Fuel Tax Act errroneous?

ARGUMENT

* * * *

II. *THE REFUSAL OF THE TRIAL COURT TO ORDER THE DEFENDANT TO REPAY TO PLAINTIFFS AND MEMBERS OF THE PLAINTIFF CLASS ALL FEES, FINES OR PENALTIES COLLECTED BY DEFENDANTS PURSUANT TO THE DIESEL FUEL TAX ACT WAS ERRONEOUS.*

The Appellees, in their Cross Appeal filed on March 12, 1984, argue that the Trial Court erred in refusing to award Appellees monetary relief in accordance with their prayer for relief and the October 7, 1982 stipulation of the parties.

The Appellants, in support of their claim that the Trial Court's refusal was proper, advance several propositions in their Reply Brief filed on April 25, 1984. Appellees believe that certain of these propositions are misapplied to the instant case.

The Appellants first suggest that this Court limit its review of the decision below to a determination of

whether the trial court "abused its discretion" in refusing to order the repayment of fees collected under the questioned legislation (Appellant's Reply Brief, Page 25). But a careful reading of the case cited in support of this proposition, *Johnson v. Johnson*, 125 Vt. 470 (1966) reveals that appellate review should begin wi a determination of whether the lower court based its grant or denial of equitable relief on equitable considerations relevant to and appropriate for the type of equitable proceeding involved. Only if the answer is affirmative is the Court's action "reviewable only upon a clear and affirmative showing of abuse." *Johnson*, supra at Page 423.

Appellees contend here, as they did in their cross appeal, that the Trial Court failed to identify any equitable considerations which override the fact that the parties herein have stipulated to a definite form of relief (Stipulation, October 7, 1982, Printed Case, Page 3). A declaratory judgment decree should render the relief prayed for where it will clarify the legal relations of the parties. *Commerce Insurance Company of New York v. Panpandrea*, 121 Vt. 386 (1960). This Court, therefore, should expand its review beyond the "abuse of discretion" standard.

Appellants next suggest that an award of refunds is barred because the Appellees have benefited from the expenditure of the challenged fees for highway maintenance and therefore are estopped from recovering the fees, citing *Brattleboro Retreat v. Town of Brattleboro*, 106 Vt. 228, 238-9 (1934). But in that case the Plaintiff, a charitable institution, voluntarily accepted the terms of its legislative charter of operation and challenged its constitutionality only after decades of operation thereunder. The Plaintiffs herein challenged the legality of the Diesel Fuel Tax Act immediately upon its enactment. Also Plaintiffs had no choice but to pay the fees. Failure to do so would subject them to sanctions, including fines,

jail terms and license suspensions under 23 V.S.A. 3009, 3022, 3024. The principle enunciated in *Brattleboro* is applicable only if a legislative enactment is voluntarily accepted.

Appellants next argue that the granting of refunds would have a serious adverse financial impact on the state treasury and therefore is "against the public interest." (Appellant's Reply Brief, Page 28). But Appellants should be estopped from now asserting this so-called equitable consideration as they long ago agreed to a refund of the questioned fees if the statute was declared unconstitutional (Stipulation, October 7, 1982, Printed Case, Page 3).

Appellants claim that the Vermont Agency of Transportation cannot afford to refund the fees collected under the challenged statutes. It must be pointed out that there is an existing statutory alternative to an outright refund. Under 23 V.S.A. 3020(b) the Commissioner of Motor Vehicles is permitted to "credit the account of a licensee for any fees or taxes "illegally or erroneously collected". Appellees, without conceding that refunds of fees assessed pursuant to an unconstitutional statute should ever be construed as against the public interest, suggest that the alternative remedy would alleviate the fiscal burden allegedly associated with direct refunds.

Appellants further argue that Appellees, by electing to bring this class action, have thereby forfeited their rights to individual refunds under 23 V.S.A. 3020(b). On the contrary, the parties to this action expressly stipulated that any fees illegally collected may "be refunded pursuant to 23 V.S.A. 3020 . . ., 23 V.S.A. 328 or in any other manner ordered by such court" (Printed Case, Page 3. Appellants, by stipulating that alternative remedies were in fact acceptable and appropriate, cannot now claim that Appellees have irrevocably elected a particular form of remedy. In any event, the case cited by Appel-

lants in support of their "election of remedies argument, *Chittenden Trust Co. v. MacPherson*, 139 Vt. 281 (1981), is inapplicable here. The question in that case was whether a litigant should be permitted to collaterally attack, by a class action, an unappealed from probate decree. The Court's ruling focused not on the "election of remedies" principle, but on the doctrine of *res adjudicata* and is therefore not relevant authority for the appellant's position.

Appelles submit that the doctrine of sovereign immunity does not apply in this action and that monetary relief is an appropriate remedy and incorporate by reference those supporting arguments advanced in Appellee's Cross Appeal.

Appellees respectfully request that the Supreme Court reverse the Washington Superior Court's decision and direct that any taxes penalties, interest or fees wrongfully collected by the Commissioner pursuant to the provisions of 23 V.S.A. 415, 3007, and 3010 be refunded.

CONCLUSION

For the reasons set forth herein the Appellees respectfully request that the Honorable Court uphold the decision of the Washington Superior Court that the fuel user license fees imposed by 23 V.S.A. 415, 3007 and 3010 are unconstitutional and void, and further that the Honorable Court direct the Washington Superior Court to order repayment of all fees, fines or penalties collected by Defendants pursuant to said unconstitutional statutes in accordance with the request for relief set forth in Plaintiff's Complaint.

[Signatures omitted]

APPENDIX E

STATE OF VERMONT

WASHINGTON COUNTY, SS

WASHINGTON SUPERIOR COURT

DOCKET No. S185-82Wnc

AMERICAN TRUCKING ASSOCIATIONS, INC. and CHEMICAL LEAMAN TANK LINE, INC. and ANDERSON TRUCKING SERVICE, INC., Individually and on behalf of all others similarly situated,

Plaintiffs

vs.

WILLIAM CONWAY, VERMONT COMMISSIONER OF MOTOR VEHICLES, PAUL PHILBROOK, VERMONT COMMISSIONER OF PUBLIC SAFETY, RICHARD SNELLING, GOVERNOR OF THE STATE OF VERMONT, and TOM EVSLIN, SECRETARY OF THE VERMONT AGENCY OF TRANSPORTATION,

Defendants

MOTION TO ALTER JUDGMENT ORDER

NOW COME the Plaintiffs, American Trucking Associations, Inc., Chemical Leaman Tank Line Incorporated and Anderson Trucking Service, Inc., by and through their attorneys, Conley and Foote, and move the Honorable Court pursuant to V.R.C.P. 59(e) to alter the Judgment Order in this case dated August 31, 1983 by ordering that the Defendants repay to the Plaintiffs and members of the Plaintiff class, any fees, fines or penalties, collected from said Plaintiffs by Defendants pursuant to 23 V.S.A. § 3007, 415, and 3010 or as a result of prosecution of Plaintiffs and the members of the Plaintiff class for violation of the said statutes, all in accordance with a certain Stipulation dated October 7, 1982, filed in this cause.

[Signatures omitted]

APPENDIX F

STATE OF VERMONT
WASHINGTON COUNTY, SS

WASHINGTON SUPERIOR COURT

Docket No. S185-82Wnc

[Caption Omitted in Printing]

MEMORANDUM IN SUPPORT OF MOTION TO ALTER JUDGMENT

Rule 59(e) of the Vermont Rules of Civil Procedure provides a basis for any party to request that the Court alter or amend its judgment on motion served not later than 10 days after entry of the Judgment Order. The reporter's notes in relation to the said Rule indicate that in the Federal Courts, motions of this type have been determined to be the appropriate method for modification of judgment orders or corrections thereto where in the Court's discretion such changes seem warranted in the interests of justice.

In this matter, the parties have agreed pursuant to a Stipulation dated October 7, 1982, a copy of which is attached hereto, that upon the declaration by Order of a Vermont Superior Court that all or any portion of number 172 of the Acts of the 1982 (1981 Adjourned) Session of the Vermont Legislature are unconstitutional, repayment of any fees and penalties wrongfully or illegally obtained by the State of Vermont and its instrumentalities would be refunded pursuant to 23 V.S.A. 3020, 23 V.S.A. 328 or in any other manner ordered by such

Court. The clear implication of the Court's Opinion and Order in this case dated August 31, 1983 is that such fees and penalties as were collected as a result of the enforcement of 23 V.S.A. 3007, 415 and 3010 will be refunded to the Plaintiffs and the relevant members of the Plaintiff class.

The purpose of this Motion is to clarify the methodology for such repayment and to avoid any dispute between the parties in that regard. It should be noted that in the Complaint in this matter dated June 2, 1982 the Plaintiffs requested the following relief:

> An Order directing Defendants to repay to Plaintiffs and members of the Plaintiff class any fees or penalties wrongfully, illegally or unconstitutionally collected from said Plaintiffs by Defendants pursuant to the statutes complained of herein.

For the reasons hereinabove set forth, the Plaintiffs respectfully request that their Motion to Alter the Judgment Order in this matter be granted.

[Signatures omitted]

STATE OF VERMONT

WASHINGTON COUNTY, ss

WASHINGTON SUPERIOR COURT

Docket No. S185-82Wnc

[Caption Omitted in Priting]

STIPULATION

NOW COME the parties in the above entitled action, by and through their respective attorneys, and stipulate and agree as follows:

1. The class to be represented by the named Plaintiff in the herein action is the class of all interstate motor carriers whose base truck registrations are issued by jurisdictions other than the State of Vermont (that is the persons owning or operating motor trucks upon the highways of the State not registered or required to be registered in this State, in the language of 23 V.S.A. 3007(b)), and who are now or may in the future become subject to the requirements and liable for payment of the fees set forth in 23 V.S.A. 415, 3007, and 3010 and section 15(c), all as enacted and amended pursuant to Number 172 of the Acts of the 1982 (1981 adjourned) session of the Vermont Legislature.

2. That in the event said Act Number 172 is finally declared to be unconstitutional and void in whole or in part, by Order of a Vermont Superior Court or any higher court having competent appeals jurisdiction

thereof, any fees and penalties wrongfully or illegally obtained by the State of Vermont and its instrumentalities and ordered to be repaid thereby may be refunded pursuant to 23 V.S.A. 3020 as enacted by said Act Number 172, 23 V.S.A. 328 or in any other manner ordered by such Court.

[Signatures omitted]

APPENDIX G

STATE OF VERMONT

WASHINGTON COUNTY, SS.

WASHINGTON SUPERIOR COURT

Docket No. S185-82WnC

[Caption Omitted in Printing]

OBJECTION TO MOTION TO ALTER JUDGMENT ORDER

NOW COME the Defendants by and through their attorneys Robert C. Schwartz and Thomas R. Viall, Assistant Attorneys General and object to the Plaintiffs' Motion to Alter the Judgment Order in this case. The basis for the objections are as follows:

1. If payment to the Plaintiffs' class is made, it will create an even greater inequity than it is attempting to rectify in that it will leave Vermont registered trucks, 18,000 pounds and over, still in position of having paid the fuel tax while out-of-state trucks have not; and, therefore, creates a discriminatory situation since Vermont registered trucks are not members of the Plaintiffs' class.

2. A stipulation does not agree that any fees or penalties *shall* be repaid, but merely sets forth a methodology by which they *could* be repaid, if so ordered by the Court, and if funds were available.

3. The ruling that the fuel license fee is unconstitutional with regard to the Plaintiffs' class, does not per se carry with it an automatic refund of fees and penalties collected. It is necessary to decide the issues of whether the Plaintiffs' class had derived a benefit from this fee and whether a breaking of a law, whether constitutional or not, should be condoned without paying a penalty.

For all the foregoing reasons, the Defendants respectfully object to the Plaintiffs' Motion to Alter and pray that the Court will deny the Motion or in the alternative, conduct a hearing to determine what, if any, limitations should be put thereon.

[Signatures omitted]

APPENDIX H

IN THE SUPREME COURT OF THE STATE OF VERMONT

AMERICAN TRUCKING ASSOCIATIONS, INC.; and INTERNATIONAL TRANSPORT, INC., and G.H. HARNUM, INC., Individually and on behalf of all others similarly situated

vs.

WILLIAM CONWAY, VERMONT COMMISSIONER OF MOTOR VEHICLES, PAUL PHILBROOK, VERMONT COMMISSIONER OF PUBLIC SAFETY, RICHARD SNELLING, GOVERNOR OF THE STATE OF VERMONT and TOM EVSLIN, SECRETARY OF THE VERMONT AGENCY OF TRANSPORTATION, Each Individually and in their official capacities

---

Supreme Court Docket no. 82-021

Appeal from the

WASHINGTON SUPERIOR COURT

Docket no. S-217-81 Wnc

BRIEF [FOR APPELLANTS]

STATEMENT OF THE CASE

This is an action for declaratory judgment seeking declaratory, injunctive and monetary relief, (Complaint, Motion to Amend Complaint, Printed Case pp.1, 59) which was brought pursuant to 12 V.S.A. 4711 et seq. by American Trucking Associations, Inc., International Transport, Inc., and G. H. Harnum, Inc., individually and on behalf of a class defined by Order of the Washington Superior Court dated July 22, 1981. The Plaintiff class was defined as including "all interstate motor carriers primarily registered outside of the State of Vermont and now or during pendency of this action subject to payment of fees prescribed by 23 V.S.A. 415, 415a and 417." (Printed Case, p. 87). The Plaintiffs' application for temporary injunctive relief was denied by Order of the Washington Superior Court dated June 4, 1981.

The Washington Superior Court held a hearing on Plaintiffs' Motion for Preliminary Injunction and on the merits on August 6 and 7, 1981. The parties also submitted a Stipulation of Fact to the Court on August 6, 1981. (Printed Case, p. 103). It was agreed by the parties at the hearing on the merits that all evidence introduced at the hearings on Plaintiffs' Motion for a Temporary Restraining Order (June 3, 1981), Plaintiffs' Motion for Class Certification (July 22, 1981), and the hearing on the merits (August 6 and 7, 1981) should be considered by the Court in rendering its opinion on the merits. (Transcript, August 6, 1981; p. 51-2). After preparation of the transcripts of all hearings, and the filing of Memoranda of Law by the parties, Judge Edwin H. Amidon, Jr., in the Court's "Findings of Fact, Conclusions of Law and Judgment Order" dated January 1, 1982, as amended by an "Amendment to Findings of Fact, Conclusions of Law and Judgment Order" dated 7 January 1982, held that the statutes which were challenged in this action did not violate either the United

States' or the Vermont Constitutions, and dismissed the Plaintiffs' action with prejudice. It was further ordered that Defendant recover of Plaintiffs their costs of action. It is from this order, as amended, that the Plaintiffs appeal.

* * *

CONCLUSION

In its Judgment Order dated January 1, 1982, the Washington Superior Court upheld the constitutional validity of the statutes in question and so refused to grant Plaintiffs the relief requested in their complaint, stating as follows:

> It is hereby ordered and adjudged that Plaintiffs' action is dismissed with prejudice and that Defendants recover of Plaintiffs their costs of action. (Printed Case, pp. 253-4).

The precise relief sought by Plaintiffs-Appellants is the reversal of the said Judgment Order, and the remand of the herein action to the Washington Superior Court for the purposes of granting to Appellants appropriate relief as requested in their Complaint.

[Signatures omitted]

APPENDIX I

IN THE SUPREME COURT OF THE
STATE OF VERMONT

AMERICAN TRUCKING ASSOCIATIONS, INC., and INTERNATIONAL TRANSPORT, INC., and G. H. HARNUM, INC., individually and on behalf of all others similarly situated

vs.

WILLIAM CONWAY, VERMONT COMMISSIONER OF MOTOR VEHICLES, PAUL PHILBROOK, VERMONT COMMISSIONER OF PUBLIC SAFETY, RICHARD SNELLING, GOVERNOR OF THE STATE OF VERMONT and TOM EVSLIN, SECRETARY OF THE VERMONT AGENCY OF TRANSPORTATION, Each Individually and in their official Capacities

---

Supreme Court Docket No. 83-452

APPEAL FROM THE
WASHINGTON SUPERIOR COURT
DOCKET NO. S-217-81 Wnc

BRIEF [FOR APPELLANTS]

STATEMENT OF THE CASE

This is an action which is being appealed to the Vermont Supreme Court for the second time. It challenges the constitutionality of certain statutory provisions adopted in the Act of May 13, 1981, No. 87, secs. 18-19a, 1981 Vt. Acts 329, 340-342 (codified at 23 V.S.A. §§ 415-419 (Cum. Supp. 1982)), (hereinafter referred to as Act No. 87). Plaintiffs are seeking declaratory, injunctive and monetary relief on behalf of themselves and a class defined by the Washington Superior Court by order dated July 22, 1981. (First Printed Case, p. 87)[1]. The members of the Plaintiff class include "all interstate motor carriers primarily registered outside of the State of Vermont and now or during pendency of this action subject to payment of fees prescribed by 23 V.S.A. 415, 415a and 417."

At the time of filing of the Complaint, Plaintiffs made an immediate application for temporary injunctive relief. The Washington Superior Court denied the Plaintiff's Motion for a Temporary Restraining Order on June 4, 1981, ruling that a methodology existed by statute for payment of refunds of fees paid in under the statutes attacked, and that therefore any harm to the Plaintiffs was not irreparable in nature. It should be noted that the monetary relief requested by the Plaintiffs is a refund to all Plaintiffs, and members of the Plaintiff class, of fees paid in under 23 V.S.A. 415, 415a and 417 for the period during which Act No. 87 was in force, as well as a refund of all penalties paid by Plaintiffs under 23 V.S.A. 421 for a like time period.

---

[1] Given the extensive record in this case, Appellants have not repeated the reproduction of items contained in the Printed Case of the first appeal in this matter (Supreme Court Docket No. 82-021). Items from the Printed Case in that appeal will be referred to as "First Printed Case," and items from the Printed Case in the herein appeal will be designated "Second Printed Case." There also are some additional documents to be filed simultaneously with this Brief, which will be designated "Supplemental Printed Case."

The hearing on the merits was combined with a hearing on Plaintiffs Motion for Preliminary Injunction on August 6 and 7, 1981. Certain facts were submitted to the Trial Court by Stipulation. (First Printed Case, p. 103). It was also agreed by the parties that all evidence introduced at earlier hearings in the matter, *i.e.* June 3, 1981 hearing on Plaintiff's Motion for a Temporary Restraining Order, and July 22, 1981 hearing on Class Certification, would be weighed in the Court's decision on the merits. The purpose of that agreement was to prevent the necessity of reintroducing evidence already in the record. (Transcript, August 6, 1981; pp. 51-52).

After submission of legal memoranda and Requests to Find by the parties, the Washington Superior Court, the Honorable Edwin H. Amidon, Jr., presiding, issued its "Findings of Fact, Conclusions of Law and Judgment Order" dated January 1, 1982 and an amendment to same dated January 7, 1982. (First Printed Case, Pages 243-254, 255). The Trial Court found for the Defendants, upheld the statutes in question, ordered the matter dismissed with prejudice, and ordered that Defendants recover of Plaintiffs their costs of action.

Plaintiffs appealed to the Vermont Supreme Court from the said Order by Notice of Appeal dated January 8, 1982 (First Printed Case, p. 256). In *American Trucking Associations, Inc. v. Conway*, 142 Vt. 17, 451 A.2d 42 (September 7, 1982), the Supreme Court vacated the judgment of the Washington Superior Court, and remanded the case for further factual findings.

The remanded proceeding was specially reassigned to Acting Superior Judge Edwin H. Amidon, Jr. on October 1, 1982. Second Printed Case, p. 1). The parties submitted additional Requests to Find on November 15, 1982 (Second Printed Case, pp. 2-11, 12-36) and on August 5, 1983, the Washington Superior Court issued its "Amended Findings of Fact." (Second Printed Case, pp. 55-60).

Since it was unclear at the time of issuance of the Amended Findings whether they were intended to serve as a confirmation of the Original Judgment Order in the case, or indeed as a new Judgment Order, Plaintiffs filed a notice of Appeal dated August 18, 1983, and simultaneously requested judgment in their favor in the Superior Court by Motion of the same date. (Second Printed Case, pp. 61, 71-72).

On November 16, 1983, Acting Superior Judge Amidon issued a Judgment Order dismissing Plaintiffs' action with prejudice. It was also ordered that Defendants recover of Plaintiffs their costs of action. In order to fully protect their rights of appeal, Plaintiffs filed an additional Notice of Appeal dated November 21, 1983 (Supplemental Printed Case, pp. 1,2). The parties have stipulated that both Notices of Appeal be consolidated in one proceeding, and to assure a speedy consideration of this case by the Supreme Court, have agreed that the relevant date of commencement of the appeal be August 18, 1983, the date of the first Notice of Appeal. This brief is being filed in accordance with that stipulation. (Supplemental Printed Case, p. 3)

Plaintiffs are seeking a reversal of the Washington Superior Court Judgment Order of November 16, 1983, and entry of judgment on the merits in their favor.

* * *

Conclusion

In its Judgment order dated November 16, 1983, the Washington Superior Court upheld the constitutional validity of the statutes in question and therefore refused to grant Plaintiffs the relief requested in their Complaint, stating as follows:

> ". . . it is hereby Ordered and Adjudged that Plaintiffs' action is Dismissed With Prejudice and

that Defendants recover of Plaintiffs' their costs of action."

The precise relief sought by the Plaintiff-Appellants is a declaration that the statutes in question are unconstitutional, the reversal of the above Judgment Order, and the remand of the herein action to the Washington Superior Court for the purposes of granting to Appellants appropriate monetary and other relief as requested in their Complaint.

[Signatures omitted]

Supreme Court, U.S.
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CLERK

No. 86-69

In the Supreme Court of the United States

OCTOBER TERM, 1986

AMERICAN TRUCKING ASSOCIATIONS, INC., *et al.*,
Petitioners

v.

WILLIAM CONWAY, COMMISSIONER OF MOTOR VEHICLES, STATE OF VERMONT, *et al.*,
Respondents

On Petition for a Writ of Certiorari to the Supreme Court of Vermont

REPLY BRIEF FOR THE PETITIONERS

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REPLY BRIEF FOR THE PETITIONERS

I. THIS COURT HAS JURISDICTION TO DECIDE THE QUESTION PRESENTED IN THE PETITION.

Respondents argue (Br. in Opp. 2-17) that this Court lacks jurisdiction to review the federal question presented in the petition because petitioners failed to preserve it. In fact, however, petitioners expressly raised the question in the courts below and the Supreme Court of Vermont expressly decided it. At all stages in the state court litigation, petitioners asserted their claim for a refund as an integral part of their claim for relief under the federal Constitution. No opinion of this Court has ever suggested that the Court lacks jurisdiction to consider the appropriate remedy for a federal constitutional violation where, as here, the complaining party has both alleged a federal constitutional violation and demanded a specific type of relief as a consequence of that violation at all stages in the lower courts.

A. Petitioners Properly Raised The Federal Question At Trial And In The Vermont Supreme Court.

1. As the Supreme Court of Vermont stated (Pet. App. 4a), petitioners' original complaints in the Vermont Superior Court "sought declaratory and injunctive relief, contending that the fees imposed [by the Vermont statutes] violated their rights under the Commerce Clause of the United States Constitution [and] . . . the Fourteenth and Fifth Amendments." See also *id.* at 17a, 26a. As the Supreme Court of Vermont also stated, petitioners demanded a refund of taxes collected pursuant to the unconstitutional statutes as an integral part of their federal constitutional claim: "In addition to the request for injunctive and declaratory relief, plaintiffs sought repayment by the State of any fees collected pursuant to the challenged statutes" (*id.* at 4a). At no time did petitioners ever separate their claims for declaratory, injunctive, and monetary relief; each claim was part and parcel of a demand for full relief to redress violations of the United States Constitution. After prevailing on the

merits, petitioners argued before the trial court that their right to monetary relief followed as a necessary consequence of the finding of unconstitutionality. Thus, petitioners reiterated their demand for "[a]n order directing defendants to repay to plaintiffs . . . any fees or penalties wrongfully, illegally or unconstitutionally collected." Br. in Opp. App. 31a.

When the Vermont Superior Court granted injunctive and declaratory relief but declined to order a refund, petitioners contended in the Supreme Court of Vermont that the favorable ruling on the merits necessarily entitled them to monetary relief as well. Petitioners noted that courts order "refunds of highway use fees" as a matter of course "after determining that the statute authorizing the fee was unconstitutional." Br. in Opp. App. 12a. Petitioners made clear that they "explicitly dispute[d]" that the "doctrine of sovereign immunity" could be applied to preclude a refund in a constitutional case such as this one. *Id.* at 14a. In particular, petitioners cited (*id.* at 15a) a decision of this Court, *Larson* v. *Domestic and Foreign Commerce Corp.*, 337 U.S. 682, 690-691 (1949), that restricted the ability of government officials to plead sovereign immunity to foreclose federal constitutional claims.

In short, petitioners made clear in the state court litigation that their right to declaratory, injunctive, and monetary relief stemmed from the Commerce Clause and the Fourteenth Amendment. Petitioners demanded each of these remedies as an inseparable part of their claim for full relief under the Constitution. In these circumstances, respondents have no basis for opposing jurisdiction.

2. A review of this Court's decisions confirms the fallacy in respondents' jurisdictional objections. As the Court has pointed out, "[o]ur jurisdiction does not depend on citation to book and verse" (*Eddings* v. *Oklahoma*, 455 U.S. 104, 114 n.9 (1982)) and "no particular form of words or phrases is essential." *PruneYard Shopping Center* v. *Robins*, 447 U.S. 74, 85 n.9 (1980). The Court

has jurisdiction to review even "inexplicit" constitutional claims asserted in the lower courts. *Braniff Airways* v. *Nebraska Board*, 347 U.S. 590, 598-599 (1954).[1] Thus, the Court's decisions amply demonstrate that "[s]ubstantial generosity is shown in accepting significant changes in the focus of an argument once the threshold of presentation to the state courts is crossed." 16 C. Wright, A. Miller, E. Cooper & E. Gressman, *Federal Practice & Procedure* § 4022 at 704 (1977).

Respondents' contrary assertion rests on the artificial theory that petitioners had a duty to separately label and analyze the constitutional arguments supporting their claims for declaratory, injunctive, and monetary relief. See Br. in Opp. 17 n.6. But "[p]arties are not confined here to the same arguments which were advanced in the courts below upon a Federal question there discussed." *Illinois* v. *Gates*, 462 U.S. 213, 220 (1983). All that is required is "that the alleged right of a federal character must in some way be drawn to the attention of the state court so that it may know, or from the nature of the pleadings be held to have known, that a federal right was before it for adjudication." *St. Louis Railway Co.* v. *Starbird*, 243 U.S. 592, 597 (1917). "The federal right is not required to be pleaded in any special or particular form." *Id.* at 598. Indeed, this Court's recent decisions have reviewed constitutional claims when the parties presented the substance of those claims in the courts below even though no explicit mention of the federal Constitu-

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[1] In *Braniff*, the Court decided a Fourteenth Amendment issue even though the appellant had not presented that issue in state court. The Court found it sufficient that the appellant had "timely raised and preserved its contention that its property was not taxable." See also *Lear, Inc.* v. *Adkins*, 395 U.S. 653, 662 n.10, 678-680 (1969), addressing the constitutional question whether federal law "preempts" the doctrine of estoppel in patent litigation, even though the appellant had advocated only an "exception" to the estoppel doctrine in state court. The Court pointed out in *Lear* that "we have the duty to consider the broader implications of Lear's contention, and vindicate, if appropriate, its claim to relief on somewhat different grounds than it chose to advance below."

tion appeared in the record. See, *e.g.*, *Wood* v. *Georgia*, 450 U.S. 261, 265 n.5, 275-277 (1981); *Vachon* v. *New Hampshire*, 414 U.S. 478, 479 n.3, 481-482 (1974).

The authorities cited by respondents serve only to confirm the defects in their jurisdictional objections. In *Webb* v. *Webb*, 451 U.S. 493, 495-501 (1981), this Court declined to assume jurisdiction when it appeared "that nowhere in the opinion of the Georgia Supreme Court is any federal question mentioned, let alone expressly passed upon." In addition, "nowhere did [the petitioner] cite to the Federal Constitution or to any cases relying on the . . . Federal Constitution." Likewise, in *Illinois* v. *Gates*, 462 U.S. at 220, the parties "never . . . raised or addressed the question whether the federal exclusionary rule should be modified in any respect," even in the petition for certiorari. In this case, by contrast, the claims for relief asserted by petitioners rested on the Commerce Clause and the Fourteenth Amendment at every stage of the litigation; the briefs submitted in the Vermont Supreme Court addressed the relationship between the federal Constitution and the asserted right of refund; and in those briefs the parties cited federal constitutional decisions analyzing the limits of the doctrine of sovereign immunity. This suffices to support jurisdiction.

B. The Vermont Supreme Court Expressly Decided The Federal Question.

This Court has jurisdiction to review the question presented in the petition for an independent reason: the Supreme Court of Vermont considered and decided it. In its opinion, the Supreme Court of Vermont acknowledged that petitioners' claims for relief rested on the federal Constitution. Pet. App. 4a, 9a. And the court analyzed the relationship between petitioners' constitutional claim for monetary relief and the doctrine of sovereign immunity (*id.* at 10a-11a):

> We base our decision on sovereign immunity. . . . [S]uits challenging the constitutionality of a state statute or its enforcement are not considered suits

> against the State for purposes of sovereign immunity. *Larson v. Domestic & Foreign Commerce Corp.*, 337 U.S. 682, 690-91 (1949); . . . But an action to recover money which would be payable from state funds may be barred as a suit against the State. *Larson, supra*, 337 U.S. at 691 n. 11; . . . This distinction is grounded in the principle of sovereign immunity that the state legislature should determine the State's liability for money judgments.

The Vermont Supreme Court also stated its belief that this Court's past decisions establish that a "suit for a refund of taxes allegedly collected in violation of the Commerce Clause is a suit against the state," which may be "barred by sovereign immunity." Pet. App. 11a. Its opinion, which relies on several decisions of this Court (*id.* at 10a-11a), including *Larson*, therefore demonstrates that the court actually decided petitioners' claim that the federal Constitution forecloses the defense of sovereign immunity in cases of this kind. See *Webb's Fabulous Pharmacies, Inc.* v. *Beckwith*, 449 U.S. 155, 159 n.5 (1980) (holding that a state supreme court opinion sufficiently addressed a federal constitutional issue even though there "is no specific reference to the Federal Constitution in the court's *per curiam* opinion," because the opinion discussed general principles of federal constitutional law); *Payton* v. *New York*, 445 U.S. 573, 582 n.19 (1980).

C. Acceptance Of Respondents' Jurisdictional Arguments Would Convert 28 U.S.C. § 1257 Into A Trap For Litigants.

Respondents' artificial pleading arguments, which have more basis in *Chitty on Pleading* than in prior decisions of this Court, would turn 28 U.S.C. § 1257 into a trap for litigants and would seriously erode this Court's ability to protect federal constitutional rights. In the present case, it would be particularly unjust to accept respondents' contrived objections to this Court's jurisdiction over the refund issue when, at all stages in this litigation, all parties understood that petitioners sought a tax refund as an integral part of their federal constitutional claim,

and petitioners received express assurances that the Vermont courts would grant a refund if petitioners prevailed on the merits.

When petitioners originally filed suit in federal court seeking to enjoin collection of the unconstitutional state taxes, the federal court relegated them to state court on the ground that they had an "adequate remedy" in state court, including an "award of monetary relief." Pet. App. 86a. That ruling rested on an affidavit from the State of Vermont that described available refund remedies. *Id.* at 86a n.1. When petitioners then turned to the Vermont Superior Court, it too denied preliminary injunctive relief against collection of the unconstitutional taxes, again assuring petitioners of the availability of a refund should they prevail on their constitutional claims (*id.* at 80a-81a):

> [T]he Court finds that no irreparable injury will occur to Plaintiffs should the new fee system be permitted to go into effect. Defendants' records will permit any excess fees wrongfully collected to be exactly determined and speedily refunded to specific Plaintiffs should they prevail on the merits.

When the Vermont Superior Court later invoked the doctrine of "sovereign immunity," it nonetheless referred to the availability of monetary relief following administrative proceedings, citing a statutory right of "refund" to recover a tax "which 'has been illegally . . . collected.'" Pet. App. 32a & n.2. The Supreme Court of Vermont was the first court to state that *no* right of refund was available by virtue of the doctrine of sovereign immunity (*id.* at 10a-12a)—and even that court had previously remanded the case on the express assumption that petitioners would be "entitled to refunds for taxes collected . . . on the ground that the taxes were unconstitutionally exacted" (*id.* at 27a).

Respondents now scold petitioners for failing to petition the state supreme court for rehearing to further litigate their right to a refund. Br. in Opp. 13-16. In fact, however, petitioners would have risked additional

infringement of their constitutional rights if they had sought rehearing and delayed issuance of the mandate. As petitioners explained to the Vermont Supreme Court in their Motion for Shortening of Period for Issuance of Mandate, pp. 3-4 (filed Feb. 28, 1986):

> Plaintiff-Appellees' remedy in this matter has been limited to prospective relief. . . . The inequitable result is that, because the statutes are still technically in effect, members of the Plaintiff-Appellees class are still being compelled to make payments under an unconstitutional law without hope of a refund.
>
> The State is taking full advantage of this technicality. Secretary of the Agency of Transportation, Susan C. Crampton, has issued a statement . . . declaring the State's intent to enforce the unconstitutional laws until . . . the day before the mandate is issued.

In these circumstances, respondents can hardly fault petitioners for turning promptly to this Court for protection of their federal constitutional rights. See *PruneYard Shopping Center* v. *Robins*, 447 U.S. at 86 n.9.

II. THE DECISION BELOW IMPAIRS PETITIONERS' RIGHTS UNDER THE COMMERCE AND DUE PROCESS CLAUSES.

Little need be added on the merits of the case, since respondents have said almost nothing in defense of the result below and have not denied its practical importance. In particular, respondents have not disputed our showing that a refund of taxes exacted in violation of the Commerce Clause is necessary to effectuate the prohibition of discrimination against interstate commerce, that the tax payments made by petitioners were involuntary, and that the decision below conflicts with a recent decision of the Supreme Court of New Hampshire.

Respondents nonetheless take the position that a state may impose a tax on interstate motor carriers in blatant violation of the Commerce Clause, coerce the carriers to pay the tax (even while litigating its constitutionality) by preventing them from engaging in commerce in the state, and then refuse to refund the tax after it has been

declared unconstitutional. Not surprisingly, that is not the law. This Court's decisions establish that "denial by a state court of a recovery of taxes exacted in violation of the laws or Constitution of the United States is itself a contravention of the Fourteenth Amendment." *Carpenter* v. *Shaw*, 280 U.S. 363, 369 (1930).

Respondents attempt to avoid this principle by relying on the Eleventh Amendment. But the Eleventh Amendment merely "bars suits against the States in *federal* court" (*Atascadero State Hospital* v. *Scanlon*, 105 S. Ct. 3142, 3147 (1985) (emphasis added)) and thus has nothing to do with this case. See *Nevada* v. *Hall*, 440 U.S. 410, 420 (1979). It is true, of course, that the Eleventh Amendment is an affirmation that the states possess a common law sovereign immunity in their own courts. See *Atascadero*, 105 S. Ct. at 3145. That common law immunity, however, may not be used to bar a suit for the refund of taxes involuntarily assessed in violation of the federal Constitution.

First, as explained in the petition (at 21), it has never been thought that the Constitution permits sovereign immunity to be invoked to bar suits for *restitution of specific property* wrongfully withheld, as opposed to damages. See, *e.g.*, *Florida Dept. of State* v. *Treasure Salvors, Inc.*, 458 U.S. 670, 685-686 (1982); *Tindal* v. *Wesley*, 167 U.S. 204 (1897). That is the precise situation here: as cases such as *Carpenter* and *Ward* v. *Love County*, 253 U.S. 17, 24 (1920), recognize, a party who protests the payment of unconstitutional taxes, through the filing of a lawsuit or otherwise, puts the state on notice that the challenged taxes constitute specific property subject to restitution and should be segregated from funds in the general treasury. The brief in opposition, which does not dispute that petitioners satisfied this notice requirement by filing suit *before* the taxes went into effect, offers no answer to this argument.[2]

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[2] The Vermont Supreme Court rejected the restitution argument in reliance on *Larson* v. *Domestic and Foreign Commerce Corp.*,

Second, and more important, this Court has already held that sovereign immunity is no defense to a suit, in *state* court, to recover taxes assessed in violation of the Constitution. See Pet. 17-22. Respondents' efforts to distinguish those precedents merely reflect their confusion between Eleventh Amendment and sovereign immunity principles.

To begin with, the fact that *Ward* and *Iowa-Des Moines Nat. Bank* v. *Bennett*, 284 U.S. 239 (1931), involved suits against counties rather than states was entirely irrelevant to this Court's analysis. The Court's decisions simply enforced the guarantees of the Fourteenth Amendment that property not be taken "arbitrarily and without due process of law" (*Ward*, 253 U.S. at 24) —a guarantee that applies with full force to the states. To be sure, there is a distinction between states and counties for Eleventh Amendment purposes, because the Eleventh Amendment confers immunity from suit in *federal* court only on the states. But *Ward* and *Iowa-Des Moines*—like this case—were suits brought in *state* court, and therefore in no way turned on the defendant's status as a county.[8]

Moreover, respondents are simply wrong in suggesting that the Court in *Carpenter* ordered a refund of the unconstitutionally assessed taxes pursuant to state statute. Although the taxpayers had brought suit in reliance on a state refund statute, the Supreme Court of Oklahoma

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supra, which stated that sovereign immunity applies in constitutional cases if the plaintiff seeks "the disposition of unquestionably sovereign property." 337 U.S. at 691 n.11. In the present case, however, the property at issue is *private* property, seized by the State under compulsion and subject to advance protest. It is the antithesis of "unquestionably sovereign property."

[8] By contrast, *Lincoln County* v. *Luning*, 133 U.S. 529 (1890), and *Moor* v. *County of Alameda*, 411 U.S. 693 (1973), the two cases cited by respondents to support their state-county distinction (Br. in Opp. 23 n.12), were suits brought in *federal* court and thus raised questions of Eleventh Amendment immunity.

held that the statute was inapplicable. See *Carpenter* v. *Shaw*, 272 P. 393, 395 (1928). This Court reversed, explicitly relying on its holding in *Ward*, 253 U.S. at 24, that "*no statutory authority was essential* to enable or require" the refund of money collected in violation of the Constitution. *Carpenter*, 280 U.S. at 369 (emphasis added).

Congress could have allowed suits such as this to be brought in federal court. See, *e.g.*, *Atascadero*, 105 S. Ct. at 3145; *Parden* v. *Terminal Ry.*, 377 U.S. 184, 192 (1964). Instead, Congress took the opposite approach—it insisted, by passing the Tax Injunction Act, that state tax litigation be centralized in state courts. Congress did so on the express assumption, rooted in the Supremacy Clause, that the doors of the state courts would be open for the vindication of federal claims and that taxes exacted in violation of the federal Constitution would be refunded. See *California* v. *Grace Brethren Church*, 457 U.S. 393, 412 & n.28, 413-414 (1982). Yet the upshot of respondents' argument is that states may seize money or property through coercive and unconstitutional taxes, and no court anywhere may order restitution. That startling argument, accepted by the Vermont Supreme Court but rejected by this Court, plainly warrants review.[4]

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[4] Respondents have filed a conditional cross-petition (No. 86-276) challenging the Vermont Supreme Court's decision striking down the state tax under the Commerce Clause. As respondents acknowledge (86-276 Pet. 7-8), the Vermont Supreme Court's decision on the merits directly conflicts with the decision of the Supreme Court of Pennsylvania in *American Trucking Associations, Inc.* v. *Scheiner*, appeal docketed, No. 86-357 (U.S. Sept. 3, 1986). The instant case, which raises important remedial issues, thus presents an excellent complement to the substantive question presented in *Scheiner* and should be considered in tandem with that case. In the alternative, the Court may wish to hold this petition and the conditional cross-petition pending disposition of the appeal in *Scheiner*.

Respectfully submitted.

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Nos. 86-69 and 86-276

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In the Supreme Court of the United States

OCTOBER TERM, 1986

AMERICAN TRUCKING ASSOCIATIONS, INC., *et al.*,
Petitioners

v.

WILLIAM CONWAY, COMMISSIONER OF MOTOR VEHICLES, STATE OF VERMONT, *et al.*,
Respondents

WILLIAM CONWAY, COMMISSIONER OF MOTOR VEHICLES, STATE OF VERMONT, *et al.*,
Cross-Petitioners

v.

AMERICAN TRUCKING ASSOCIATIONS, INC., *et al.*,
Cross-Respondents

On Petitions for a Writ of Certiorari to the Supreme Court of Vermont

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SECOND SUPPLEMENTAL MEMORANDUM FOR THE PETITIONERS

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SECOND SUPPLEMENTAL MEMORANDUM FOR THE PETITIONERS

This memorandum is filed to address the impact of the decision in *American Trucking Associations, Inc.* v. *Scheiner*, No. 86-357 (June 23, 1987), on the pending petition and cross-petition in the above-captioned cases.[1]

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[1] Our first supplemental memorandum, filed in September 1986, called the Court's attention to the decision of the Supreme Court of New Hampshire in *Private Truck Council of America, Inc.* v. *New Hampshire*, 128 N.H. 466, 517 A.2d 1150 (1986). That decision embraced legal principles squarely contradictory to those followed by the court below with respect to the duty to refund unconstitutional taxes.

The issue raised by the petition is whether the Constitution obligates Vermont to refund moneys collected from petitioners pursuant to flat highway taxes found to violate the Commerce Clause or whether the State may invoke principles of sovereign immunity to preclude a refund remedy. The State's conditional cross-petition challenges the underlying holdings of the Vermont Supreme Court that the taxes at issue violate the Commerce Clause.

We assume that this Court has withheld action in this case because the important refund issue it presents would have been mooted by a decision upholding the lawfulness of the similar Pennsylvania highway taxes involved in *Scheiner*. Now that *Scheiner* has been decided against the constitutionality of the taxes there at issue, however, the refund question is ripe for consideration and is of vital importance to the trucking industry and the states. Accordingly, we submit that the Court should grant ATA's petition and deny Vermont's cross-petition.

1. The $40 entry fee provided by Vermont's Act 87 and the $50 decal tax enacted by Act 172 were each subject to attack on two grounds. First, they were challenged as embodying a facial or structural discrimination: the entry fee in terms applied only to out-of-state trucks, and the decal tax, though seemingly neutral on its face, was in fact accompanied by an equal reduction in truck registration fees that fully offset its financial impact on Vermont-registered trucks. Second, both taxes were challenged as discriminatory because they were "flat"—i.e., not related to the extent of any vehicle's actual use of Vermont's highways.

In the challenge to Act 172, the Vermont Superior Court found that the decal fee had a discriminatory impact in actual operation because it imposed a per-mile cost 22 times greater for out-of-state trucks than for Vermont-registered trucks (86-69 Pet. App. 59a). It accordingly held that Act 172's "flat tax" feature vio-

lated the Commerce Clause. The Vermont Supreme Court agreed that Act 172 (and Act 87 as well) was unconstitutional, but it rested its holdings on the alternative ground that the taxes entailed facial discrimination not justified under the compensatory tax doctrine (*id.* at 7a-8a, 18a-20a).

Although this Court in *Scheiner* had no occasion to reach the facial discrimination issue that was common to both cases, the decision makes clear beyond peradventure that Vermont's taxes violate the Commerce Clause in precisely the same manner as Pennsylvania's axle tax and marker fee. Vermont's taxes, like Pennsylvania's, were of a fixed amount unrelated to the extent of actual highway use. As the Court stated in *Scheiner*, such highway taxes are "plainly discriminatory" because "they impose a cost per mile on [out-of-state] trucks that is [many times greater than] the cost per mile borne by local trucks" (slip op. 18). Thus, there is absolutely no reason to review the issue raised in Vermont's cross-petition (No. 86-276).

2. Because the ruling in *Scheiner* establishes that Vermont exacted highway taxes from out-of-state companies in violation of the Commerce Clause, the refund issue raised in the petition is fully ripe for adjudication by this Court. We need not repeat here the reasons fully canvassed in our petition and reply brief why this question is important and timely. We simply note two intervening developments that bear upon the decision whether to grant review on this issue.

a. Vermont's principal argument in opposition to the petition was the claim that ATA had not preserved, and as a result the Vermont Supreme Court had not passed upon, the question whether the Constitution requires a refund of taxes collected in violation of the Commerce Clause. We have answered that argument at pages 1-7 of our reply brief. Our submission has been confirmed by a recent Vermont state court decision. In *American*

Trucking Associations, Inc. v. *Conway*, No. S-95-86WnC (Washington Co. May 4, 1987), the Vermont Superior Court held unconstitutional highway tax legislation adopted by the State following the invalidation of Act 172.[2] Nevertheless, the Superior Court denied a refund of the unconstitutionally-exacted taxes and expressly rejected ATA's arguments based on a constitutional right to a refund. The Superior Court stated that the Vermont Supreme Court had necessarily rejected those federal claims in the decisions below in the instant case and that it was "bound by those decisions." Slip op. 10.

b. In *First Lutheran Church* v. *Los Angeles County*, No. 85-1199 (June 9, 1987), the Court faced a similar question—whether a state could limit the remedies for a violation of the Takings Clause to injunctive relief, or whether the Constitution requires the payment of monetary compensation *ex proprio vigore*. The Court held that the Constitution itself requires a monetary remedy for the constitutional violation, despite claims of sovereign immunity. See slip op. 10-11 & n.9. This decision casts further doubt on Vermont's contention that a state may exact taxes in violation of the Commerce Clause and then assert sovereign immunity to defeat a claim for a refund of the wrongfully withheld property.

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[2] A copy of this opinion has been lodged with the Clerk of the Court.

It is therefore respectfully submitted that the petition for a writ of certiorari in No. 86-69 should be granted and the cross-petition in No. 86-276 should be denied.

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Respondents.

On Petition for a Writ of Certiorari to the Supreme Court of Vermont

BRIEF OF AMICUS CURIAE PRIVATE TRUCK COUNCIL OF AMERICA, INC. IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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IN THE

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On Petition for a Writ of Certiorari to the Supreme Court of Vermont

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BRIEF OF AMICUS CURIAE PRIVATE TRUCK COUNCIL OF AMERICA, INC. IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

The Private Truck Council of America, Inc., urges the Court to grant the petition for a writ of certiorari to the Supreme Court of Vermont to review the exceedingly important and recurring question of constitutional remedies presented by that court's judgment.

THE INTEREST OF AMICUS CURIAE

The Private Truck Council of America, Inc. is a business association of companies engaged in private motor carriage— *i.e.*, carriage not for hire but in furtherance of their own nontransportation businesses. PTCA has more than 1800 members and associated companies. On

behalf of its members PTCA has taken an active role in challenging state motor carrier taxes and fees that discriminate against interstate commerce or otherwise violate the United States Constitution or federal laws. In 1984 PTCA succeeded in obtaining a judgment by the Supreme Court of Indiana striking down an Indiana property tax levied solely on vehicles engaged in interstate commerce. *Huie v. Private Truck Council of America, Inc.*, 466 N.E.2d 485 (Ind. 1984). In 1986 PTCA successfully challenged a Louisiana fee imposed only on private carriers operating in interstate commerce in Louisiana and registered in other states. *Private Truck Council of America, Inc. v. Louisiana*, No. 289, 481 (19th Judicial Dist. Ct. East Baton Rouge Parish; judgment entered Jan. 20, 1986.) In 1986 PTCA also obtained favorable judgments from the Supreme Courts of Maine and New Hampshire invalidating so-called "retaliatory taxes" imposed by those states only on carriers whose vehicles are registered in certain other states. *Private Truck Council of America, Inc. v. Secretary of State*, 503 A.2d 214 (1986), *cert. denied* No. 85-1423 (1986); *Private Truck Council of America Inc. v. State of New Hampshire*, (N.H. S. Ct. No. 86-088; decided August 12, 1986). PTCA is currently prosecuting suits against five other states that impose similar retaliatory taxes, and it intends to continue to monitor state taxes and fees closely and, if possible, to challenge those it believes to be unconstitutional.

In view of its activities, PTCA and its members have a vital interest in the question presented by the petition in this case—whether a state may constitutionally refuse to refund taxes that have been unconstitutionally exacted as a condition of the right to operate in the state. State motor carrier taxes and fees impose an enormous burden on all segments of the interstate motor carrier industry, including particularly private carriers, and discriminatory or otherwise unconstitutional taxes and fees comprise a

significant portion of that burden. To permit states to retain such unconstitutional exactions deprives PTCA and its members of the very protections the Commerce Clause was adopted to provide.

ARGUMENT

PTCA fully agrees with petitioners that the decision of the Vermont Supreme Court refusing to grant refunds of unconstitutionally exacted fees presents an exceedingly important and recurring question. As the petition documents (Pet. 8-11), numerous recently decided and pending cases present this issue, and these cases involve hundreds of millions of dollars of assertedly unconstitutional taxes imposed by states each year on interstate motor carriers.

PTCA also agrees with petitioners that the decision below conflicts squarely with decisions of this Court. As this Court held in *Carpenter v. Shaw*, 280 U.S. 363, 369 (1930), a "denial by a state court of a recovery of taxes exacted in violation of the laws or Constitution of the United States by compulsion is itself in contravention of the Fourteenth Amendment." See also *Ward v. Love County*, 253 U.S. 17, 24 (1920); *United States v. State Tax Commission of Mississippi*, 645 F.2d 4, 5 (5th Cir.), *cert. denied*, 454 U.S. 896 (1981).[1]

A denial of such recovery is also plainly at odds with the Commerce Clause, and it largely nullifies the protections that Clause gives to persons engaged in inter-

[1] The court below relied on the Eleventh Amendment in support of its conclusion that the State is immune from any obligation to return unconstitutional taxes, but that reliance is plainly erroneous. As this Court recently explained in *Atascadero State Hospital v. Scanlon*, —— U.S. ——, 105 S.Ct. 3142, 3147 (1985), the Eleventh Amendment is only a restriction on the jurisdiction of federal courts, and does not relieve state courts from their obligation to "enforce the supreme law of the land" against states.

state commerce. The principle that states may not, under the Commerce Clause, impose taxes that discriminate in favor of local business and against interstate commerce has been described by this Court as "one of the fundamental principles of Commerce Clause jurisprudence." *Maryland v. Louisiana*, 451 U.S. 725, 754 (1981). The clear message to states of the decision below, however, is that they *may* burden interstate commerce with discriminatory taxes; they may do so for as long as they can drag out any suit challenging such taxes.

This case is a perfect illustration of how that result can effectively nullify the protections of the Commerce Clause. The challenged fees in this case were first enacted in 1981 and were promptly challenged by petitioners, who unsuccessfully sought a preliminary injunction against their future collection. In 1982 the Vermont Supreme Court reversed an initial decision upholding the fees and remanded with directions to the trial court to conduct an extensive factual inquiry into the cost-per-mile impact of Vermont's fee system on different carriers. Pet. App. 24a-30a. After that process and further appeals consumed another four years, the same court held the same fees unconstitutional on their face and without regard to their impact on a per-mile basis. Pet. App. 15a-21a. At the same time, however, the court has permitted the State to retain some $25 million of fees collected over the five years of litigation. Moreover, although the decision prospectively prevents Vermont from collecting any more of these fees, there is nothing to stop the State from enacting some new discriminatory tax or fee in some slightly different form and collecting that new levy for as long as it may take taxpayers to obtain a final adjudication of its unconstitutionality.

Furthermore, if states believe they will not be, or even may not be, liable to return unconstitutional taxes, they have no incentive to seek or facilitate the speedy resolu-

tion of suits challenging them. Quite the contrary. Similarly state courts, where such actions must usually be brought for reasons of the Eleventh Amendment and the Tax Injunction Act, 28 U.S.C. § 1341, have little incentive to accord much urgency to suits attacking state revenue measures, particularly those brought by out-of-state businesses challenging taxes that favor their locally-based competitors.[2]

The decision below is not an isolated aberration; it is one of a number of recent state supreme court decisions denying recovery of unconstitutional taxes to out-of-state claimants. Most recently, after the petition in this case was filed, the Supreme Court of New Hampshire, in a case brought by the PTCA and others, upheld the taxpayers' claim that retaliatory motor carrier taxes imposed by that State since 1982 were unconstitutional but it denied their claims for refunds of taxes paid before the suit was filed in December 1984. *Private Truck Council of America, Inc. v. State of New Hampshire, supra.*[3] Because the New Hampshire legislature repealed the tax shortly after the suit was filed, the result of the decision was that the State will retain most of the $3 million in taxes collected under the unconstitutional statute.

Similarly, the Supreme Courts of New Jersey and Maine recently refused to require the return of taxes on motor carriers found to be unconstitutional. *Continental Trailways, Inc. v. Director, Division of Motor Vehicles,* 509 A.2d 769 (N.J. 1986); *Private Truck Council of America, Inc. v. Secretary of State, supra.* In New Jersey the court candidly admitted that the denial of re-

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[2] To say this is not to question the integrity or conscientiousness of state attorneys general and state courts but simply to recognize that they are subject to natural tendencies that the Commerce Clause itself was adopted in recognition of and as protection against.

[3] A copy of this decision has been filed with the Court by petitioner in a supplemental memorandum filed September 11, 1986 in support of this petition.

funds was based on the court's policy to place the state's revenue interests over the federal constitutional rights of interstate carriers. The court stated (509 A.2d at 780): "Public policy discourages suits for refunds of taxes erroneously paid or illegally collected." See also *Private Truck Council of America, Inc. v. State of New Hampshire, supra*, slip op. at 7-8, denying refunds on the basis of "policy considerations" relating to the state's revenue interests.

In sum, it is apparent that an alarming number of state courts are subordinating the policies of the Commerce Clause to the revenue interests of their states. This Court should grant the petition and reverse the judgment of the Vermont Supreme Court in order to make clear to all states that the policies and protections of the federal Constitution remain the paramount law of the land.

CONCLUSION

The Court should grant the petition for a writ of certiorari and reverse the judgment of the Vermont Supreme Court denying refunds of unconstitutional taxes.

Respectfully submitted,

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